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Supreme Court of the United States

OCTOBER TERM, 1964

No. 496

ESTELLE T. GRISWOLD, ET AL, APPELLANTS,

v.

CONNECTICUT.

APPEAL FROM THE SUPREME COURT OF ERRORS OF CONNECTICUT

FILED SEPTEMBER 14, 1964

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 496

ESTELLE T. GRISWOLD, ET AL., APPELLANTS,

CONNECTICUT.

APPEAL FROM THE SUPREME COURT OF ERRORS OF CONNECTICUT

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Original Print

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[fol. 1]

IN THE CIRCUIT COURT, SIXTH CIRCUIT,
TO BE HELD AT NEW HAVEN, CONNECTICUT
ON NOVEMBER 24, 1961

No. CR 6-5653

STATE OF CONNECTICUT

vs.

ESTELLE T. GRISWOLD

INFORMATION WITH WARRANT

Julius Maretz, prosecuting attorney of said court, on his oath of office, complains, and information makes:

That on or about November 6th, 1961 at New Haven, Connecticut, Estelle T. Griswold of New Haven, Connecticut in violation of the provisions of Sections 53-32 and 54-196 of the General Statutes of the State of Connecticut, did assist, abet, counsel, cause and command certain married women to use a drug, medicinal article and instrument, for the purpose of preventing conception.

And the prosecuting attorney further complains and information makes, that thereafter said married women in consequence of said conduct of said Estelle T. Griswold, did in fact use said drugs, medicinal articles, and instruments for the purpose of preventing conception.

Said prosecuting attorney prays process against said accused, and that said accused may be arrested and held to answer to this information, and be thereon dealt with according to law.

Dated November 10, 1961, at New Haven, Connecticut.

Julius Maretz, Prosecuting Attorney, Circuit Court
of Connecticut, Sixth Circuit.

IN THE CIRCUIT COURT, SIXTH CIRCUIT,
TO BE HELD AT NEW HAVEN, CONNECTICUT
ON NOVEMBER 24, 1961

STATE OF CONNECTICUT

vs.

ESTELLE T. GRISWOLD

DEMURRER

The defendant demurs to the information filed herein for the reason that Sections 53-32 and 54-196 of the General Statutes of Connecticut, as they would here be applied to the defendant, are unconstitutional for the reasons that:

[fol.2] 1. They would deny her her rights to liberty and property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States.

2. They would deny her her rights to freedom of speech and communication of ideas under the First and Fourteenth Amendments to the Constitution of the United States, and Sections 5 and 6 of Article First of the Constitution of the State of Connecticut.

Defendant, By Catherine G. Roraback, Her Attorney.

IN THE CIRCUIT COURT, SIXTH CIRCUIT,
AT NEW HAVEN, CONNECTICUT

December 20, 1961

No. CR 6-5653

STATE OF CONNECTICUT

vs.

ESTELLE T. GRISWOLD

MEMORANDUM ON DEMURRER TO INFORMATION

The defendant is charged, in an information with the crime of assisting and abetting the use of a drug, medicinal article and instrument for the purpose of preventing conception.

The law of this State prohibits the use of contraceptive materials. General Statutes, Sec. 53-32.

In Connecticut there are no substantive statutory provisions dealing with the sale or distribution of contraceptive devices, nor the giving of information concerning their use.

The alleged activities of the defendant are deemed to be involved in law solely because of the general accessory statute of this State. General Statutes, Sec. 54-196.

The defendant in her demurrer claims that these statutes as applied to her are unconstitutional because:

1. They would deny her her rights to liberty and property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, and
2. They would deny her her rights to freedom of speech and communication of ideas under the First and Fourteenth Amendments to the Constitution of the United States, and Sections 5, and 6 of Article First of the Constitution of the State of Connecticut.

[fol. 3] The constitutionality of these same statutes, in identical form, were under attack by demurrer in *State v. Nelson*, (and companion cases) 126 Conn. 412. In those cases the grounds of demurrer were a general claim that the substantive statute, that is now Sec. 53-32, was an interference with the individual liberty of citizens and a deprivation thereof without due process of law in violation of the Federal and State Constitutions.

The Supreme Court of Errors in *State v. Nelson*, (and companion cases), 126 Conn. 412, found the substantive statute to be constitutional and a valid exercise of the police power of the state to regulate the relative rights and duties of all within its jurisdiction so as to guard the public morals, the public safety and the public health, as well as to promote the common good.

Now again in the instant case, the claim is made that Sec. 53-32 is unconstitutional and violates the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Since *State v. Nelson*, 126 Conn. 412 (and companion cases) our Supreme Court of Errors has had before it other cases involving these same statutes in which their constitutionality was sustained.

Buxton v. Ullman, 147 Conn. 48 (and three companion cases)

Tilston v. Ullman, 129 Conn. 84.

In those cases, the court stated that the statutes under consideration were a proper exercise of the police power of the state and did not invade rights guaranteed by the Fourteenth Amendment to the Constitution of the United States.

In *Trubeck v. Ullman*, 147 Conn. 633, the court reaffirmed its holding of the constitutionality of these statutes against the challenge of the plaintiffs that the statutes deprived them of rights guaranteed by the Fourteenth Amendment to the Federal Constitution.

In the face of these decisions, this Court is confronted with the rule of stare decisis commonly called the doctrine of precedents.

This rule is peculiarly applicable to the trial court.

Where a principle of law has become settled by a series of decisions, it is binding on the courts and should be followed in similar cases, or as otherwise expressed, the principle so settled forms a precedent for the guidance of the courts in similar cases.

This doctrine is a part of our judicial system, and it rests upon the principle that the law by which men are governed should be fixed, definite and known, and that, when it is declared by a court of competent jurisdiction authorized to construe it, in the absence of palpable mistake or error, is itself evidence of the law until it is changed by competent authority.

In *State v. Muolo*, 119 Conn. 323, our Supreme Court of Errors held that it is incumbent upon any court, in the consideration of an attack upon the constitutionality of a legislative act, to approach the question with great caution, examine it with infinite care, make every presumption and intendment in its favor, and sustain the act unless its invalidity is clear.

As to the second ground of demurrer, it may be said that the First Amendment to the Federal Constitution is a limitation on the power of Congress only, but that the Fourteenth Amendment to the Federal Constitution safeguards liberty of speech and free expression from state aggression.

Freedom of speech is embraced within the fundamental personal rights and liberties protected by the due process clause of the Fourteenth Amendment.

The right of free speech and free expression is guaranteed under Sections 5 and 6 of the Constitution of this State.

This right of free speech under both the Federal and State Constitutions is not an absolute right which carries with it into activity and professions total immunity from regulation in the performance of acts to which speech is a mere incident or means of accomplishment.

The state may enact reasonable regulations in order to promote the general welfare as well as to promote and to advance public health and public morals.

The constitutionality of these statutes has been repeatedly sustained and found to be valid legislation.

Legislation may or may not be adapted to accomplish a valid and beneficial purpose and its utility or futility is for the consideration of the legislature and not the court.

The substantive statute, Sec. 53-32 as enacted by the legislature is one of complete suppression and absolute prohibition. It admits of no exception.

[fol. 5] No person has the right to counsel or advise another to perform any act which is in violation of a judicially determined valid enactment and claim immunity from prosecution under the accessory statute, Sec. 54-196 on the ground that he has a right so to do under the constitutional guaranty of freedom of speech. To do so, she exposes herself to prosecution as a principal under the provision of the accessory statute, Sec. 54-196.

A person may be prosecuted and punished as a principal under the accessory statute, although the actual perpetrator of the crime involved has not been convicted. The relevant inquiry in such cases is whether the crime was committed and whether the accessory being prosecuted as a principal under the statute did in fact abet its commission. *State v. Wakefield*, 88 Conn. 164.

Every citizen has an equal right to use his mental endowments as well as his property, in any harmless occupation or manner; but he has no right to use them so as to injure his fellow citizens or to endanger the vital interests of society. Immunity in the mischievous use is as inconsistent with civil liberty as prohibition of the harmless use. *State v. McKee*, 73 Conn. 18.

For the reasons stated the demurrer is overruled on both grounds.

Lacey, J.

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IN THE CIRCUIT COURT, SIXTH CIRCUIT,
TO BE HELD AT NEW HAVEN, CONNECTICUT
ON NOVEMBER 24, 1961

No. CR 6-5654

STATE OF CONNECTICUT

vs.

C. LEE BUXTON

INFORMATION WITH WARRANT

Julius Maretz, prosecuting attorney of said court, on his oath of office, complains, and information makes:

That on or about November 6th, 1961 at New Haven, Connecticut, C. Lee Buxton, a duly qualified and licensed physician, of the Town of Woodbridge, State of Connecticut, in violation of the provisions of Sections 53-32 and 54-196 of the General Statutes of the State of Connecticut, did assist, abet, counsel, cause and command certain married women to use a drug, medicinal article and instrument, for the purpose of preventing conception.

And the prosecuting attorney further complains and information makes, that thereafter said married women in [fol. 6] consequence of said conduct of said C. Lee Buxton, did in fact use said drugs, medicinal articles, and instruments for the purpose of preventing conception.

Said prosecuting attorney prays process against said accused, and that said accused may be arrested and held to answer to this information, and be thereon dealt with according to law.

Dated November 10, 1961, at New Haven, Connecticut.

Julius Maretz, Prosecuting Attorney, Circuit Court
of Connecticut, Sixth Circuit.

IN THE CIRCUIT COURT, SIXTH CIRCUIT,
TO BE HELD AT NEW HAVEN, CONNECTICUT
ON NOVEMBER 24, 1961

STATE OF CONNECTICUT

vs.

C. LEE BUXTON

DEMURRER

The defendant demurs to the information filed herein for the reason that Sections 53-32 and 54-196 of the General Statutes of Connecticut, as they would here be applied to the defendant, are unconstitutional for the reasons that:

1. They would deny him his rights to liberty and property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States.
2. They would deny him his rights to freedom of speech and communication of ideas under the First and Fourteenth Amendments to the Constitution of the United States, and Sections 5 and 6 of Article First of the Constitution of the State of Connecticut.

Defendant, By Catherine G. Roraback, His Attorney.

Certificate of Service (omitted in printing).

[fol. 7]

IN THE CIRCUIT COURT, SIXTH CIRCUIT,
AT NEW HAVEN, CONNECTICUT

December 20, 1961

No. CR 6-5654

STATE OF CONNECTICUT

vs.

C. LEE BUXTON

MEMORANDUM ON DEMURRER TO INFORMATION

The defendant, a duly qualified and licensed physician, is charged in an information with the crime of assisting and abetting the use of a drug, medicinal article and instrument for the purpose of preventing conception.

The law of this State prohibits the use of contraceptive materials. General Statutes, Sec. 53-32.

In Connecticut there are no substantive statutory provisions dealing with the sale or distribution of contraceptive devices, nor the giving of information concerning their use.

The alleged activities of the defendant are deemed to be involved in law solely because of the general accessory statute of this State. General Statutes, Sec. 54-196.

The defendant in his demurrer claims that these statutes as applied to him are unconstitutional because:

1. They would deny him his rights to liberty and property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States; and

2. They would deny him his rights to freedom of speech and communication of ideas under the First and Fourteenth Amendments to the Constitution of the United States, and Sections 5 and 6 of Article First of the Constitution of the State of Connecticut.

The constitutionality of these same statutes, in identical form, were under attack by demurrer in *State v. Nelson*, (and companion cases) 126 Conn. 412. In those cases the grounds of demurrer were a general claim that the substantive statute, that is now Sec. 53-32, was an interference with the individual liberty of citizens and a deprivation thereof without due process of law in violation of the Federal and State Constitutions.

The Supreme Court of Errors in *State v. Nelson*, (and companion cases), 126 Conn. 412, found the substantive [fol. 8] statute to be constitutional and a valid exercise of the police power of the state to regulate the relative rights and duties of all within its jurisdiction so as to guard the public morals, the public safety and the public health, as well as to promote the common good.

Now again in the instant case, the claim is made that Sec. 53-32 is unconstitutional and violates the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Since *State v. Nelson*, 126 Conn. 412 (and companion cases) our Supreme Court of Errors had had before it other cases involving these same statutes in which their constitutionality was sustained.

Buxton v. Ullman, 147 Conn. 48 (and three companion cases)

Tileston v. Ullman, 129 Conn. 84.

In those cases, the court stated that the statutes under consideration were a proper exercise of the police power of the state and did not invade rights guaranteed by the Fourteenth Amendment to the Constitution of the United States.

In *Trubeck v. Ullman*, 147 Conn. 633, the court reaffirmed its holding of the constitutionality of these statutes against the challenge of the plaintiffs that the statutes deprived them of rights guaranteed by the Fourteenth Amendment to the Federal Constitution.

In the face of these decisions, this Court is confronted with the rule of stare decisis commonly called the doctrine of precedents.

This rule is peculiarly applicable to the trial court.

Where a principle of law has become settled by a series of decisions, it is binding on the courts and should be followed in similar cases, or as otherwise expressed, the principle so settled forms a precedent for the guidance of the courts in similar cases.

This doctrine is a part of our judicial system, and it rests upon the principle that the law by which men are governed should be fixed, definite and known, and that, when it is declared by a court of competent jurisdiction authorized to construe it, in the absence of palpable mistake or error, is itself evidence of the law until it is changed by competent authority.

[fol.9] In *State v. Muolo*, 119 Conn. 323, our Supreme Court of Errors held that it is incumbent upon any court, in the consideration of an attack upon the constitutionality of a legislative act, to approach the question with great caution, examine it with infinite care, make every presumption and intendment in its favor, and sustain the act unless its invalidity is clear.

As to the second ground of demurrer, it may be said that the First Amendment to the Federal Constitution is a limitation on the power of Congress only, but that the Fourteenth Amendment to the Federal Constitution safeguards liberty of speech and free expression from state aggression.

Freedom of speech is embraced within the fundamental personal rights and liberties protected by the due process clause of the Fourteenth Amendment.

The right of free speech and free expression is guaranteed under Sections 5 and 6 of the Constitution of this State.

This right of free speech under both the Federal and State Constitutions is not an absolute right which carries with it into activity and professions total immunity from regulation in the performance of acts to which speech is a mere incident or means of accomplishment.

The state may enact reasonable regulations in order to promote the general welfare as well as to promote and to advance public health and public morals.

The constitutionality of these statutes has been repeatedly sustained and found to be valid legislation.

Legislation may or may not be adapted to accomplish a valid and beneficial purpose and its utility or futility is for the consideration of the legislature and not the court.

The substantive statute, Sec. 53-32 as enacted by the legislature is one of complete suppression and absolute prohibition. It admits of no exception.

No person has the right to counsel or advise another to perform any act which is in violation of a judicially determined valid enactment and claim immunity from prosecution under the accessory statute, Sec. 54-196 on the ground that he has a right so to do under the constitutional guaranty of freedom of speech. To do so, he exposes himself to prosecution as a principal under the provision of the accessory statute, Sec. 54-196.

[fol. 10] A person may be prosecuted and punished as a principal under the accessory statute, although the actual perpetrator of the crime involved has not been convicted. The relevant inquiry in such cases is whether the crime was committed and whether the accessory being prosecuted as a principal under the statute did in fact abet its commission. *State v. Wakefield*, 88 Conn. 164.

Every citizen has an equal right to use his mental endowments as well as his property, in any harmless occupation or manner, but he has no right to use them so as to injure his fellow citizens or to endanger the vital interests of society. Immunity in the mischievous use is as inconsistent with civil liberty as prohibition of the harmless use. *State v. McKee*, 73 Conn. 18.

For the reasons stated the demurrer is overruled on both grounds.

Lacey, J.

judgment file—criminal
circuit court

IN THE CIRCUIT COURT, SIXTH CIRCUIT,
HELD AT NEW HAVEN, CONNECTICUT
ON JANUARY 2, 1962

No. CR 6-5653

No. CR 6-5654

STATE OF CONNECTICUT

vs.

ESTELLE T. GRISWOLD

C. LEE BUXTON

Present, Hon. J. Robert Lacey, Judge

JUDGMENT

Upon the complaint of Julius Maretz, Prosecuting Attorney for the circuit court, 6th circuit, charging the accused, Estelle T. Griswold and C. Lee Buxton with the crime of Sections 53-32 and 54-196 of the General Statutes of the State of Connecticut, in that they did assist, abet, counsel, cause and command certain married women to use a drug, medical article and instrument for the purpose of preventing conception.

Said accused were presented before said court on December 8, 1961. The accused, being then and there called upon to answer to said complaint for plea, said "Not Guilty", whereupon the court advised the accused of the accused's right to a trial by jury. The accused then elected to be tried by the court.

[fol. 11] After a full hearing, the court found the accused "Guilty".

It is therefore adjudged by the court that the accused is guilty in manner and form as charged in said complaint.

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clegpub

The court sentenced the accused to pay a fine of \$100.00 each.

Date of trial or hearing January 2, 1962.

Date of sentence January 2, 1962.

Warrant issued Pending Appeal.

Dated at New Haven, Connecticut, January 20, 1962.

Attest:

Paul M. Foti, Clerk.

CCT 8 (p. 2 of 2
-elegpub

IN THE CIRCUIT COURT, SIXTH CIRCUIT,
AT NEW HAVEN, CONNECTICUT

January 5, 1962

No. CR 6-5653

STATE OF CONNECTICUT

vs.

ESTELLE T. GRISWOLD

No. CR 6-5654

STATE OF CONNECTICUT

vs.

C. LEE BUXTON

MOTION FOR AN ORDER TO COMBINE APPEALS

The defendants hereby move for an order that their
appeals from the judgments in the above matters be com-

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bined and submit the annexed stipulation in support of this motion.

The Defendants, Estelle T. Griswold and C. Lee Buxton, By Catherine G. Roraback, Their Attorney.

[fol, 12]

ORDER

The foregoing motion having been presented, it is hereby Ordered that the appeals from the judgment entered in the above entitled actions be combined.

At New Haven this 10th day of January, 1962.

J. Robert Lacey, Judge of the Circuit Court of Connecticut.

IN THE CIRCUIT COURT, SIXTH CIRCUIT,
AT NEW HAVEN, CONNECTICUT

January 5, 1962

No. CR 6-5653

STATE OF CONNECTICUT

vs.

ESTELLE T. GRISWOLD

No. CR 6-5654

STATE OF CONNECTICUT

vs.

C. LEE BUXTON

STIPULATION TO JOIN APPEALS

The State of Connecticut, acting herein by Julius Maretz, Prosecuting Attorney for the Circuit Court of Connecticut for the sixth Circuit, and the defendants in the above en-

titled actions, Estelle T. Griswold and C. Lee Buxton, hereby stipulate that the appeals from the judgments rendered therein be combined.

At New Haven this 5th day of January, 1962.

The State of Connecticut, By Julius Maretz, Prosecuting Attorney for Circuit Court of Connecticut for the Sixth Circuit.

The Defendant, Estelle T. Griswold, By Catherine G. Roraback, Her Attorney.

The Defendant, C. Lee Buxton, By Catherine G. Roraback, His Attorney.

[fol. 13]

IN THE CIRCUIT COURT, SIXTH CIRCUIT,
AT NEW HAVEN, CONNECTICUT

June 12, 1962

No. CR6-5653

STATE OF CONNECTICUT

vs.

ESTELLE T. GRISWOLD

No. CR6-5654

STATE OF CONNECTICUT

vs.

C. LEE BUXTON

FINDING

First: The following facts are found:

1. The Planned Parenthood Center of New Haven, hereinafter referred to as the "Center" was opened on Novem-

ber 1, 1961, to provide information, instruction and medical advice to married persons as to the means of preventing conception and to educate married persons generally as to such means and methods.

2. The Center was located in eight rooms on the second floor of the building at 79 Trumbull Street in New Haven, Connecticut, which consisted of a reception room, a waiting room, an interview room, a consultation room, an examining room, two dressing rooms and a laboratory.

3. The Center made such information, instruction, education and medical advice available to married persons who sought it at said location from November 1, 1961 to November 10, 1961, when the Center was closed.

4. The Planned Parenthood League of Connecticut occupied and maintained an office consisting of four rooms in the front of the second floor of the same building at 79 Trumbull Street.

5. The defendant Estelle T. Griswold, is the Executive Director of said League and as such was salaried and had her office in the League quarters in the front of the building on the second floor.

6. The offices of the Center were located in the rear of the second floor and the defendant Estelle T. Griswold was the Acting Director of the Center and in charge of the administration and the educational program thereof.

7. The defendant C. Lee Buxton is a physician, licensed to practice in the State of Connecticut, who is a specialist in the field of obstetrics and gynecology; the director of [fol. 14] the University Obstetrical and Gynecological Service at the Grace-New Haven Community Hospital in New Haven, Connecticut, the chairman of the Department of Obstetrics and Gynecology and Professor of Obstetrics and Gynecology at the Yale University Medical School in New Haven, Connecticut, an author in the field of his specialty and a leader in its professional organizations.

8. The defendant C. Lee Buxton was the medical director of the Center, both before its opening and while it was in operation from November 1st to November 10th, 1961.

9: As medical director and after consultation with the Medical Advisory Committee of the Center, which Committee was appointed by him, the defendant C. Lee Buxton made all medical decisions as to the facilities of the Center, the arrangement of its rooms, the equipment purchased for it, the medical forms, history forms concerning a patient and other forms used there, the procedures followed in processing the patients at the Center, the types of contraceptive advice available and provided at the Center, the types of contraceptive articles and materials available at the Center for distribution to patients, the methods of providing the same, and the selection, assignment and supervision of the medical doctors to staff the Center.

10. The defendant C. Lee Buxton, in addition, on several occasions, as a physician, examined and gave contraceptive advice to patients at the Center while it was in operation from November 1st to November 10th, 1961.

11. The defendant Estelle T. Griswold was Acting Director of the Center both before its opening and while it was in operation from November 1st to November 10th, 1961.

12. The general procedure for the processing of a patient of the Center was as follows:

a. Individuals called the Center by telephone or came in making inquiry, and were briefly questioned to ascertain whether they were in fact seeking contraceptive advice and if so they were given an appointment for a stated day and hour.

b. The patient, having come to the Center at the appointed time, was first interviewed by a staff member who took a case history of the patient on a standard form, (Defendants' Exhibit 1.) on which was entered the patient's name, her husband's name, ages of both, employment, family income, other economic information, the patient's pregnancy history, method of contraception previously used, the reason for desiring a change of method, and the pertinent medical history of the patient, her husband and children.

c. After this the patient attended a group orientation session with other patients at which all of the methods of contraception available at the Center were described, at the conclusion of which lecture the patient selected the method which she desired to use and as to which she wished to obtain further information and advice.

d. The methods of contraception available and described in this orientation session were the diaphragm and creams and vaginal jellies used with it; creams and jellies used alone; condom; vaginal foam; anti-ovulation pills; and the rhythm method.

e. Thereafter each patient individually saw a staff doctor who gave her a pelvic examination, reviewed the method of contraception selected by the patient in the light of this examination and of her medical history, and prescribed to the patient the method selected by her unless it was contraindicated.

f. The doctor or nurse then gave the patient advice as to how to use the method of contraception prescribed, and advised her when to return to the Center for further consultation and advice.

g. The patient was then furnished with the contraceptive device, drug or contraceptive material prescribed by the doctor, made an appointment for a return visit, was charged a fee for the visit and left.

h. The fees charged to the patients were on a sliding scale ranging from a minimum of nothing to a maximum of \$15.00 and the exact fee charged any one patient was determined on the basis of family income.

i. In between the various steps described in subparagraphs (a) through (g) above, there were periods of time during which the patient was not occupied, during which she sat in the waiting room where there were various pieces of literature, including certain exhibits in evidence, (State's Exhibits A through H and Defendants' Exhibits 2 through 9) available to her and which were examined and read by some of the patients of the Center.

13. The defendant Estelle T. Griswold on several occasions between November 1st and November 10th, 1961, while the Center was in operation, interviewed persons [fol. 16] prior to giving them appointments at the Center, as described in paragraph 12 (a) above; took case histories of patients, as described in paragraph 12' (b) above; conducted the group orientation session, describing the various methods of contraception available to patients as described in paragraph 12 (c) above; and on one occasion gave a patient a drug or medicinal article to prevent conception as described in paragraph 12 (g) above.

14. Joan B. Forsberg, a housewife and mother of three children living with her family in New Haven, Connecticut, upon learning of the existence of the Center, arranged for an appointment at the Center which was made for November 8, 1961 and on that date she went to the Center as a patient, seeking contraceptive advice, where she had her case history taken by a receptionist, attended an orientation session at which the defendant Estelle T. Griswold instructed her and other women as to the various methods of contraception available at the Center and told the patients they could choose the method they would individually prefer and be furnished with the necessary materials if the doctor approved, was given a pelvic examination by a staff doctor, was told that the anti-ovulation pill method of contraception which she had chosen was all right for her to use, was instructed by the doctor in its use; was thereafter given a supply of sixty anti-ovulation pills (State's Exhibit K.) by the person on duty at the registration desk at the direction of the defendant Estelle T. Griswold, and before leaving paid a fee to the Center and was told to return to the Center in two months.

15. Thereafter, after her visit to the Center, the said Joan B. Forsberg used approximately thirty of the pills (State's Exhibit K.) which had been furnished to her at the Center, and she so used said pills for the purpose of preventing conception and the use thereof did prevent conception.

16. On November 7, 1961, one Marie Wilson Tindall, a housewife and mother of several children, living with her

family in New Haven, Connecticut, after having made an appointment beforehand went to the Center with her husband in order to obtain information concerning contraception, and while she was at the Center she had her case history taken by the receptionist, attended an orientation session with other patients at which a lady in a white coat described the various types of contraceptives available to them at the Center, was given a pelvic examination by a staff doctor, told the doctor that she had chosen a diaphragm [fol. 17] as the type of contraceptive she wished to use, was fitted and given by the doctor a diaphragm and accompanying articles (State's Exhibits M through P), and thereafter was instructed by the lady in the white coat in how to use them, and before leaving paid a fee of \$7.50 to the Center.

17. Thereafter, after her visit to the Center, the said Marie Wilson Tindall used the diaphragm and other articles furnished to her at the Center for the purpose of preventing conception.

18. On November 9, 1961, one Rosemary Anne Stevens, a young student married almost a year and living with her husband in New Haven, Connecticut, having made an appointment, went to the Center seeking to obtain contraceptive advice additional to that previously obtained by her in England, and while at the Center had her case history taken by the defendant Estelle T. Griswold, attended an orientation session at which the defendant Estelle T. Griswold described the methods of contraception available at the Center, was given a pelvic examination by the defendant C. Lee Buxton acting as a staff doctor on that day at the Center, was advised by the defendant C. Lee Buxton that the method of contraception (ortho-gynol contraceptive jelly) which she had chosen was satisfactory for her, was given instruction by him as to its use, and, before leaving the Center was given a tube of ortho-gynol vaginal jelly (State's Exhibit L.) by the defendant Estelle T. Griswold and paid a fee of \$15.00 to the Center.

19. Thereafter, after her visit to the Center, the said Rosemary Anne Stevens used said ortho-gynol vaginal jelly (State's Exhibit L.) for the purpose of preventing conception.

20. Said Rosemary Anne Stevens decided to continue with the method of contraception she was already using and her decision so to do was based on advice received by her from the defendant Estelle T. Griswold and the defendant C. Lee Buxton.

21. The defendant C. Lee Buxton served as medical director of the Center and furnished, at the Center, medical advice to married women as to the use of drugs, contraceptive articles and materials and instruments for the purpose of preventing conception because as a medical doctor he felt he was justified in giving such advice and instruction in the light of expert medical opinion.

22. The medical experts upon whose opinions the defendant C. Lee Buxton relied are:

[fol. 18] Dr. Nicholson Eastman,

Prof. Emil Novak,

Dr. Robert Latau Dickinson,

Dr. Alan Guttmacher,

Dr. John Rock,

Dr. J. Richwood Williams (now deceased),

who are recognized authorities in the field of obstetrics and gynecology.

23. It is the opinion of doctors who practice and specialize in the practice of obstetrics and gynecology in the City of New Haven and in the State of Connecticut, that it is accepted medical practice for a physician to advise a woman suffering from a serious medical condition such as hypertensive cardiovascular heart disease that pregnancy would be detrimental to her health.

24. The defendant Estelle T. Griswold served as administrative director of the Center and participated in its operation because she felt that medically prescribed methods of contraception should be made available to the married women of Connecticut in order that they might protect

their health as mothers, the emotional and economic stability of their families and promote responsible parenthood.

Second: The following conclusions have been reached:

25. The use by Joan Forsberg, for the purpose of preventing conception, of the anti-ovulation pills furnished to her by the Planned Parenthood Center of New Haven was a violation of the provisions of Section 53-32 of the General Statutes of Connecticut.

26. The use by Marie Wilson Tindall, for the purpose of preventing conception and planning her family, of the diaphragm and other materials furnished to her by the Planned Parenthood Center of New Haven was also a violation of said Section 53-32.

27. The use by Rosemary Anne Stevens, for the purpose of preventing conception, of the orthogynol jelly furnished to her by the Planned Parenthood Center of New Haven was also a violation of said Section 53-32.

28. The actions of said Joan Forsberg, Marie Wilson Tindall and Rosemary Anne Stevens were violations of this [fol. 19] statute even though each of these women is married and living with her husband, since the prohibition of the statute against the use of such articles for such a purpose is absolute.

29. It was at the Planned Parenthood Center of New Haven that the said Joan Forsberg, Marie Wilson Tindall and Rosemary Anne Stevens sought and obtained instruction and medical advice and counsel as to methods of contraception, sought and obtained under medical supervision, the drugs, medicinal articles and instruments to prevent conception, described above, and sought and obtained medical counsel and advice as to the proper method of using these articles.

30. The actions of the defendants in supervising and participating in the operation of this Center where these women sought and obtained this advice and these materials, constituted assisting, abetting, counselling, causing and commanding these women to commit a violation of the Statute, Section 53-32, (contraceptive statute) and, the acts

of the defendants themselves being thus in violation of the Statute, Section 54-196 (accessory statute) made them amenable to prosecution and punishment as a principal offender.

31. The actions of the defendant Estelle T. Griswold in taking a case history from the said Rosemary Anne Stevens, in delivering orientation lectures describing the various methods of contraception available at the Center which were heard and acted upon by the said Joan Forsberg and the said Rosemary Anne Stevens, in directing a staff member at the Center to give the said Joan Forsberg the anti-ovulation pills and in herself giving to the said Rosemary Anne Stevens the orthogynol jelly, constituted assisting, abetting, counselling, causing and commanding two married women, the said Joan Forsberg and the said Rosemary Anne Stevens, to use drugs, medicinal articles and instruments for the purpose of preventing conception, in violation of said Sections 53-32 and 54-196 of the General Statutes of Connecticut.

32. The actions of the defendant C. Lee Buxton, a doctor, in giving the said Rosemary Anne Stevens, a married woman, a pelvic examination and in approving her choice of the orthogynol jelly as to method which she would use to prevent conception, and in instructing her as to the use of such jelly, constituted assisting, abetting, counselling, causing and commanding the said Rosemary Anne Stevens to use a drug or medicinal article for the purpose of [fol. 20] preventing conception, in violation of said Sections 53-32 and 54-196 of the General Statutes of Connecticut.

33. Such actions of the defendant C. Lee Buxton are crimes irrespective of the fact that such advice and instructions were given by him in his capacity as a medical doctor.

34. Both defendants are guilty as charged.

Third: The following rulings were made on the trial:

35. The State produced in chief Harold Berg, a Detective, New Haven Police Department, as a witness, who

testified on direct-examination as to certain articles obtained by him from patients of the Center which were contraceptives recommended by and furnished by the Center, and upon his cross-examination the witness was asked the following question:

"Now in the course of your investigation, Detective Berg, did you ascertain whether these products were available anywhere else in the City of New Haven?"

to which question the State objected on the grounds that it was immaterial and irrelevant in a prosecution involving a charge that the defendants made such products available and furnished same to patients that such products could be obtained anywhere else in New Haven and/or were sold or furnished by others in New Haven, which objections were sustained by the Court and an exception taken by the defendants.

36. The defendants produced in chief Luther K. Musselman, as a witness, who having been qualified as a medical expert specializing in obstetrics and gynecology and practicing in the City of New Haven, Connecticut, upon his direct-examination was asked the following question:

"Doctor, do you have an opinion as to whether or not it is generally regarded by the medical profession as accepted practice for a physician to advise such a married woman suffering from any of these diseases or such a condition (hypertensive cardiovascular disease) that she should use drugs, medicinal articles or instruments to prevent pregnancy?"

"Doctor, do you have an opinion as to whether or not it is generally regarded by the medical profession as accepted medical practice in this State for a physician to advise a married woman suffering from any of these—from such a condition—change that, that she should use drugs, medicinal articles or instruments to prevent pregnancy?"

"Doctor, do you have an opinion as to whether or not it is accepted medical practice in the State of Connecticut

for a physician to give advice to a married woman as to the use of drugs, medicinal articles or instruments to prevent conception where the married woman seeks such advice from the doctor for the purpose of planning her family and spacing her children?"

to each of which questions the State objected on the grounds that it was immaterial and irrelevant in a prosecution involving a charge that a doctor had given advice to a patient as to the use of drugs, medicinal articles and instruments for the purpose of preventing conception, whether or not it is accepted medical practice in the State of Connecticut to give such advice under such circumstances as outlined in the questions, and in connection with the first question on the additional grounds that the question was not limited to the practice in the State of Connecticut, which objections were sustained by the Court and an exception taken by the defendants as to each question.

37. The defendants produced in chief Louis Middlebrook, as a witness, who having been qualified as a medical expert in the field of obstetrics and gynecology practicing in Hartford, Connecticut, upon his direct-examination was asked the following questions:

"Now, Doctor, do you have an opinion as to whether or not it is generally regarded by the medical profession in Connecticut as accepted medical practice for a physician to advise such a married woman suffering from such a condition (hypertensive cardiovascular disease) that she should use drugs, medicinal articles and instruments to prevent pregnancy?"

"Doctor, do you have an opinion whether or not it is generally regarded by the medical profession in Connecticut as accepted medical practice for a physician to give advice to a married woman as to the use of drugs, medicinal articles or instruments to prevent [fol. 22] conception when the married woman does not suffer from such a condition but when she merely seeks advice as to means of planning her family, and spacing and limiting the number of her children?"

to each of which questions the State objected on the grounds that it was immaterial and irrelevant in a prosecution involving a charge that a doctor had given advice to a patient as to the use of drugs, medicinal articles and instruments for the purpose of preventing conception, whether or not it is accepted medical practice in the State of Connecticut to give such advice under such circumstances as outlined in the questions, which objections were sustained by the Court and an exception taken by the defendants as to each question.

Fourth: The defendants made the following claims of law respecting the judgment to be rendered, upon which the Court ruled as hereinafter stated:

38. The statute which penalizes the use of a drug, medicinal article or instrument for the purpose of preventing conception, Section 53-32 of the General Statutes of Connecticut, has no express or implied exception as to the persons subject to its prohibition and applies equally to all persons.

The Court so found.

39. The application of said statute in such manner as to prohibit married women from using drugs, medicinal articles or instruments for the purpose of preventing conception, would deprive such married women of their rights to life and liberty without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

The Court refused so to find.

40. Said statute is unconstitutional since it prohibits married women, among others, from using drugs, medicinal articles or instruments for the purpose of preventing conception, and since such prohibition denies to such married women their rights to life and liberty without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

The Court refused so to find.

41. In any prosecution under the provisions of Section 54-196 of the General Statutes of Connecticut, the State has

[fol. 23] the burden of proving not only that the defendant aided and encouraged another to commit an offense in violation of a criminal statute of this state, but also that thereafter such an offense was in fact committed by such other person.

The Court so found.

42. Since the provisions of Section 53-32 of the General Statutes of Connecticut cannot be constitutionally applied in such manner as to penalize the actions of the three married women, Joan Forsberg, Marie Wilson Tindall and Rosemary Anne Stevens, in using, for the purpose of preventing conception, the drugs, medicinal articles and instruments obtained by them from the Planned Parenthood Center of New Haven, the State has failed to prove an essential element of its case, the commission of an offense in violation of a substantive criminal statute.

The Court refused so to find.

43. The actions of the defendants in performing their administrative, supervisory and directory roles in the operation of a center in New Haven, Connecticut, where married women were furnished instruction and medical advice and counsel as to the use of contraceptives and were furnished, under medical supervision, with such contraceptives, do not constitute "assisting, abetting, counselling, causing or commanding" another to commit an offense within the meaning of the prohibitions of Section 54-196 of the General Statutes of Connecticut.

The Court refused so to find.

44. The actions of the defendant Estelle T. Griswold in taking a case history of a patient at the Center, in delivering orientation lectures to the married women, at the Center in which she discussed the methods of contraception available at the Center, and in giving or directing others to give contraceptives to married women, did not constitute "assisting, abetting, counselling, causing or commanding" another to commit an offense within the meaning of Section 54-196 of the General Statutes of Connecticut.

The Court refused so to find.

45. The actions of the defendant Estelle T. Griswold in delivering orientation lectures to the married women at the Center in which she discussed the methods of contraception available at the Center, are protected by the provisions of [fol. 24] First and Fourteenth Amendments to the Constitution of the United States and Article First, Sections 5 and 6 of the Constitution of the State of Connecticut, and such speech on her part does not constitute "assisting, abetting, counselling, causing or commanding" another to commit an offense within the meaning of Section 54-196 of the General Statutes of Connecticut.

The Court refused so to find.

46. The defendant C. Lee Buxton is a physician and in examining the patient Rosemary Anne Stevens and advising her as to the use of a contraceptive, he was acting as a doctor performing professional duties.

The Court so found.

47. Application of the provisions of Sections 53-32 and 54-196 of the General Statutes of Connecticut to the actions of the defendant C. Lee Buxton as described in paragraph 46 hereof would constitute a denial of his rights to liberty and property without due process of law in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

The Court refused so to find.

48. Application of the provisions of Sections 53-32 and 54-196 of the General Statutes of Connecticut to the action of the defendant C. Lee Buxton in giving medical advice to his patients is a denial of his right to freedom of speech in violation of the provisions of the First and Fourteenth Amendments to the Constitution of the United States and Article First, Sections 5 and 6 of the Constitution of the State of Connecticut.

The Court refused so to find.

49. Application of criminal sanctions under the provisions of Sections 53-32 and 54-196 of the General Statutes of Connecticut, to the defendant Estelle T. Griswold for her actions in taking a case history of a patient at the Center,

in delivering orientation lectures and instruction to married women at the Center in which she discussed the methods of contraception available at the Center, and in giving or directing others to give contraceptives to married women at the Center, denies to her her rights to life and liberty without due process of law in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

The Court refused so to find.

[fol. 25] 50. Application of criminal sanctions under the provisions of Sections 53-32 and 54-196 of the General Statutes of Connecticut, to the defendants for their actions in performing their administrative, supervisory, and directory roles in the operation of a Center in New Haven, Connecticut, where married women were furnished instruction and medical advice and counsel as to the use of contraceptives and were furnished, under medical supervision, with such contraceptives, is a denial of their rights to life and liberty without due process of law, in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

The Court refused so to find.

51. The State has failed to establish that either defendant has committed an offense as charged in the information.

The Court refused so to find.

All exhibits admitted in evidence in the hearing of these cases are hereby made a part of the Finding and may be used without printing.

LACEY, J.

IN THE CIRCUIT COURT, SIXTH CIRCUIT,
AT NEW HAVEN, CONNECTICUT

July 31, 1962

No. CR6-5653

STATE OF CONNECTICUT

vs.

ESTELLE T. GRISWOLD

No. CR6-5654

STATE OF CONNECTICUT

vs.

C. LEE BUXTON

MOTION TO CORRECT FINDING

The appellants in the above-entitled case respectfully move that the finding be corrected as follows:

1. By striking out the words "because as a medical doctor he felt he was justified in giving such advice and instruction in the light of expert medical opinion" of paragraph 21, and substituting the words "because, based on the overwhelming opinion of medical experts in this country, this type of advice is an aspect of medical care which it is the responsibility of every doctor to furnish when, in his opinion the patient should have it, and he therefore felt justified as a medical doctor in giving such advice and instruction."

[fol. 26]. 2. By adding the words "and that she should avoid and prevent a pregnancy." to the end of paragraph 23.

3. By adding the words "and he, as a doctor, is required by the accepted standards of the medical profession to commit such acts." to the end of paragraph 33.

The appellants annex hereto as Exhibit A all of the evidence material to the determination of this motion, certified by the stenographer who took it.

The Appellants, By Catherine G. Roraback, Their Attorney.

Certificate of Service (omitted in printing).

IN THE CIRCUIT COURT, SIXTH CIRCUIT,
AT NEW HAVEN, CONNECTICUT

August 22, 1962

No. CR6-5653

STATE OF CONNECTICUT

vs.

ESTELLE T. GRISWOLD

No. CR6-5654

STATE OF CONNECTICUT

vs.

C. LEE BUXTON

MEMORANDUM ON MOTION TO CORRECT FINDING.

Pursuant to the motion of the defendants to correct the finding, the trial court does hereby amend the Finding in the following particulars:

1. By striking out the words "because as a medical doctor he felt he was justified in giving such advice and instruction in the light of expert medical opinion" contained in Paragraph 21 of the Finding and substituting in place thereof the following: "because based on the overwhelming opinion of medical experts in this country, this type of advice is an aspect of medical care which it is the responsibility of every doctor to furnish when, in his opinion, the patient should have it, and he therefore felt justified as a medical doctor in giving such advice and instruction."

2. By adding the words "and that she should avoid and prevent a pregnancy" to the end of paragraph 23.

No further additions or corrections.

LACEY, J.

Filed Sept. 13, 1962

IN THE CIRCUIT COURT, SIXTH CIRCUIT,
AT NEW HAVEN, CONNECTICUT

September 26, 1962

No. CR6-5653

STATE OF CONNECTICUT

vs.

ESTELLE T. GRISWOLD

No. CR6-5654

STATE OF CONNECTICUT

vs.

C. LEE BUXTON

ASSIGNMENT OF ERRORS

The Court erred:

1. In overruling the demurrers to each of the informations.

2. In that the information and findings of the trial court do not support the judgment because:

a. The provisions of Section 53-32 of the General Statutes are unconstitutional, since there is no exception as to the persons subject to their prohibition, and since their application in such manner as to prohibit *married* women from using drugs, medicinal articles or instruments for the purpose of preventing conception, would deprive such married women of their rights to life and liberty without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States.

b. The defendants are here charged under the provisions of Section 54-196 of the General Statutes of Connecticut, with aiding and abetting *married* women to commit offenses under said Section 53-32 of the General Statutes. One of the essential elements which the prosecution must prove to establish a violation of Section 54-196 is that a substantive offense was in fact committed. Since the provisions of Section 53-32 cannot [fol. 28] be constitutionally applied in such manner as to penalize the actions of *married* women in using, for the purposes of preventing conception, drugs, medicinal articles and instruments obtained by them through, and with the advice and encouragement of, the defendants, and since it is only the actions of such *married* women which the State claims to constitute such substantive offenses, the State has failed to prove the commission of a substantive offense and thus failed to establish a violation of Section 54-196.

c. The actions of the defendants in performing their administrative, supervisory and directory roles in the operation of a center in New Haven, Connecticut, under medical supervision and control, where *married* women were furnished medical advice and counsel as to the use of contraceptives and were furnished, under medical supervision, with such contraceptives, do not constitute "assisting, abetting, counselling, causing or commanding" another to commit an offense within the meaning

of the prohibitions of Section 54-196 of the General Statutes of Connecticut.

d. The actions of the defendant Estelle T. Griswold in taking a case history of a patient at the Center, in delivering orientation lectures to the married women at the Center, in which she discussed the methods of contraception available at the Center, and in giving or directing others to give contraceptives to married women, did not constitute "assisting, abetting, counselling, causing or commanding" another to commit an offense within the meaning of Section 54-196 of the General Statutes of Connecticut.

e. The actions of the defendant Estelle T. Griswold in delivering orientation lectures to the married women at the Center in which she discussed the methods of contraception available at the Center, are protected by the provisions of the First and Fourteenth Amendments to the Constitution of the United States and Article First, Sections 5 and 6 of the Constitution of the State of Connecticut, and such speech on her part does not constitute "assisting, abetting, counselling, causing or commanding" another to commit an offense within the meaning of Section 54-196 of the General Statutes of Connecticut.

f. The defendant C. Lee Buxton is a physician, and in examining a married woman and advising her as [fol. 29] to the use of contraceptives he was performing professional duties. The application in this prosecution of the provisions of Sections 53-32 and 54-196 of the General Statutes of Connecticut to these actions of the defendant Buxton are unconstitutional since such application would deny to him his rights to liberty and property without due process of law in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

g. Application of the provisions of Sections 53-32 and 54-196 of the General Statutes of Connecticut to the action of the defendant C. Lee Buxton in giving

medical advice to his patients is a denial of his right to freedom of speech in violation of the provisions of the First and Fourteenth Amendments to the Constitution of the United States and Article First, Sections 5 and 6 of the Constitution of the State of Connecticut.

h. Application of criminal sanctions under the provisions of Sections 53-32 and 54-196 of the General Statutes of Connecticut, to the defendant Estelle T. Griswold for her actions in taking a case history of a patient at the Center, in delivering orientation lectures to married women at the Center in which she discussed the methods of contraception available at the Center, and in giving or directing others to give, under medical supervision, contraceptives to married women at the Center, denies to her her rights to life and liberty without due process of law in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

i. Application of criminal sanctions under the provisions of Sections 53-32 and 54-196 of the General Statutes of Connecticut, to the defendants for their actions in performing their administrative, supervisory, and directory roles in the operation of a Center in New Haven, Connecticut, under medical supervision and control, where married women were furnished medical advice and counsel as to the use of contraceptives, and were furnished, under medical supervision, with such contraceptives, is a denial of their rights to life and liberty without due process of law, in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

j. The State has failed to establish that either defendant has committed an offense as charged in the informations.

[fol. 30] 3. In reaching the conclusions set forth in paragraphs 30 through 33 of the Finding when the facts set forth in the finding do not support them.

4. In failing to correct the Finding by adding thereto the facts stated in paragraph 3 of appellants' Motion to Correct the Finding, which were admitted and undisputed.

5. In rejecting the testimony of Harold Berg, as appears in Exhibit A annexed hereto and in paragraph 35 of the Finding.

6. In rejecting the testimony of Luther K. Musselman as appears in Exhibit B annexed hereto and in paragraph 36 of the Finding.

7. In rejecting the testimony of Louis Middlebrook as appears in Exhibit C annexed hereto and in paragraph 37 of the Finding.

8. In concluding upon all the evidence that the defendants were guilty of the crime charged beyond a reasonable doubt.

The Defendants, By Catherine G. Roraback, Their Attorney.

Filed Sept. 26, 1962

EXHIBIT "A"

The State produced in chief Harold Berg, a Detective, New Haven Police Department, as a witness, who testified on direct-examination as to certain articles obtained by him from patients of the Center which were contraceptives recommended by and furnished by the Center, and upon his cross-examination the witness was asked the following question:

"Now, in the course of your investigation, Detective Berg, did you ascertain whether these products were available anywhere else in the City of New Haven?"

to which question the State objected on the grounds that it was immaterial and irrelevant in a prosecution involving a charge that the defendants made such products available and furnished same to patients that such products could be

obtained anywhere else in New Haven and/or were sold or furnished by others in New Haven, which objections were sustained by the Court and an exception taken by the defendants.

[fol. 31]

EXHIBIT "B"

The defendants produced in chief Luther K. Musselman, as a witness, who having been qualified as a medical expert specializing in obstetrics and gynecology and practicing in the City of New Haven, Connecticut, upon his direct-examination was asked the following questions:

"Doctor, do you have an opinion as to whether or not it is generally regarded by the medical profession as accepted practice for a physician to advise such a married woman suffering from any of these diseases or such a condition (hypertensive cardiovascular disease) that she should use drugs, medicinal articles or instruments to prevent pregnancy?"

"Doctor, do you have an opinion as to whether or not it is generally regarded by the medical profession as accepted medical practice in this State for a physician to advise a married woman suffering from any of these—from such a condition—change that, that she should use drugs, medicinal articles or instruments to prevent pregnancy?"

"Doctor, do you have an opinion as to whether or not it is accepted medical practice in the State of Connecticut for a physician to give advice to a married woman as to the use of drugs, medicinal articles or instruments to prevent conception where the married woman seeks such advice from the doctor for the purpose of planning her family and spacing her children?"

to each of which questions the State objected on the grounds that it was immaterial and irrelevant in a prosecution involving a charge that a doctor had given advice to a patient

as to the use of drugs, medicinal articles and instruments for the purpose of preventing conception, whether or not it is accepted medical practice in the State of Connecticut to give such advice under such circumstances as outlined in the questions, and in connection with the first question on the additional grounds that the question was not limited to the practice in the State of Connecticut, which objections were sustained by the Court and an exception taken by the defendants as to each question.

EXHIBIT "C"

The defendants produced in chief Louis Middlebrook, as a witness, who having been qualified as a medical expert in [fol. 32] the field of obstetrics and gynecology practicing in Hartford, Connecticut, upon his direct-examination was asked the following questions:

"Now, Doctor, do you have an opinion as to whether or not it is generally regarded by the medical profession in Connecticut as accepted medical practice for a physician to advise such a married woman suffering from such a condition (Hypertensive cardiovascular disease) that she should use drugs, medicinal articles and instruments to prevent pregnancy?"

"Doctor, do you have an opinion whether or not it is generally regarded by the medical profession in Connecticut as accepted medical practice for a physician to give advice to a married woman as to the use of drugs, medicinal articles or instruments to prevent conception when the married woman does not suffer from such a condition but when she merely seeks advice as to means of planning her family, and spacing and limiting the number of her children?"

to each of which questions the State objected on the grounds that it was immaterial and irrelevant in a prosecution involving a charge that a doctor had given advice to a patient as to the use of drugs, medicinal articles and instruments

for the purpose of preventing conception, whether or not it is accepted medical practice in the State of Connecticut to give such advice under such circumstances as outlined in the questions, which objections were sustained by the Court and an exception taken by the defendants as to each question.

IN THE CIRCUIT COURT OF CONNECTICUT,
APPELLATE DIVISION

Date of Judgment January 7, 1963

Decision Announced January 17, 1963

File No. CR 6-5653 AP

STATE OF CONNECTICUT

v.

ESTELLE T. GRISWOLD

File No. CR 6-5654 AP

STATE OF CONNECTICUT

v.

C. LEE BUXTON

Argued October 19, 1962.

[fol. 33] Informations charging the defendants with the crime of assisting and abetting the use of drugs, medicinal articles and instruments for the purpose of preventing conception; brought to the Circuit Court in the sixth circuit and tried to the court, *Lacey, J.*; judgment of guilty in each case and appeal by the defendants. *No error; certified to the Supreme Court of Errors.*

CATHERINE C. RORABACK, for the appellants, (defendants).

JULIUS MABETZ, prosecuting attorney, and JOSEPH B. CLARK, assistant prosecuting attorney, for the appellee (for the appellee (State).

OPINION—January 7, 1963

KOSICKI, J. Both of these cases were tried together and, by stipulation, the appeals from the judgments rendered have been combined. The informations contained identical allegations charging each defendant with a violation of §§ 52-32 and 54-196 of the General Statutes in that each defendant "did assist, abet, counsel, cause and command certain married women to use a drug, medicinal article and instrument, for the purpose of preventing conception . . . and that thereafter said married women in consequence of said conduct [of the defendant] did in fact use said drugs, medicinal articles, and instruments for the purpose of preventing conception."¹ In each case a demurrer was filed on the ground that the quoted sections of the General Statutes were unconstitutional as here applied because (1) they denied the defendants their rights to liberty and property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States and (2) they denied them their rights to freedom of speech and communication of ideas under the First and Fourteenth Amendments to the Constitution of the United States and §§ 5 and 6 of Article First of the Constitution of Connecticut. Both demurrers were overruled and error is assigned in the ruling of the court.

The court found the following facts. The Planned Parenthood Center of New Haven, referred to herein as Center, was opened on November 1, 1961 to provide information, instruction and medical advice to married persons as to means and methods of preventing conception and to educate persons generally as to such means and methods. The Center was located in eight rooms on the second floor of a building at 79 Trumbull Street in New Haven, which consisted of a reception room, waiting room, interview room, consultation room, examining room, two dressing rooms and a laboratory. The Center operated from November

[fol. 34] 1 to November 10 when it was closed following the arrest of the defendants. The Planned Parenthood League occupied an office consisting of four rooms on the second floor of the same building. The defendant Estelle T. Griswold held the salaried office of executive director of the League. She was also the acting director of the Center and in charge of administration and the educational program.

The defendant C. Lee Buxton is a physician, licensed to practice in the state of Connecticut, who is a specialist in the field of obstetrics and gynecology, the director of the University Obstetrical and Gynecological Service at the Grace-New Haven Community Hospital in New Haven, Connecticut, the chairman of the Department of Obstetrics and Gynecology and Professor of Obstetrics and Gynecology at the Yale University Medical School in New Haven, an author in the field of his specialty and a leader in its professional organizations. He was the medical director of the Center, both before its opening and while it was in operation from November 1 to November 10, 1961. As such medical director and after consultation with the Medical Advisory Committee of the Center, which committee was appointed by him, Doctor Buxton made all medical decisions as to the facilities of the Center, the arrangement of its rooms, the equipment purchased for it, the medical forms, patients' history forms and other forms used there, the procedures followed in processing the patients at the Center, the types of contraceptive advice available and provided at the Center, the types of contraceptive articles and materials available at the Center for distribution to patients, the methods of providing the same, and the selection, assignment and supervision of the medical doctors to staff the Center. In addition, Dr. Buxton on several occasions, as a physician, examined and gave contraceptive advice to patients at the Center while it was in operation from November 1 to November 10, 1961.

The general procedure for the processing of a patient of the Center was as follows: Individuals called the Center by telephone or came in making inquiry, and were briefly questioned to ascertain whether they were in fact seeking contraceptive advice and, if so, they were given an appoint-

ment for a stated day and hour. The patient, having come to the Center at the appointed time, was first interviewed by a staff member who took a case history of the patient on a standard form on which was entered the patient's name, her husband's name, ages of both, employment, family income, other economic information, the patient's pregnancy history, method of contraception previously used, the reason for desiring a change of method, and the pertinent medical history of the patient, her husband and children. After this the patient attended a group orientation session with other patients at which all of the methods of contraception available at the Center were described, at the conclusion of which lecture the patient selected the method which she desired to use and as to which she wished to obtain further information and advice.

Thereafter each patient individually saw a staff doctor who gave her a pelvic examination, reviewed the method of contraception selected by the patient in the light of this examination and of her medical history, and prescribed to the patient the method selected by her unless it was contraindicated. The doctor or nurse then gave the patient advice as to how to use the method of contraception prescribed, and advised her when to return to the Center for further consultation and advice.

The patient was then furnished with the contraceptive device, drug or contraceptive material prescribed by the doctor, made an appointment for a return visit, was charged a fee for the visit and left. The fees charged to the patient were on a sliding scale ranging from nothing to a maximum of \$15.00 and the exact fee charged any one patient was determined on the basis of family income. In the waiting room and available to patients were various pamphlets some of which contained information, instruction and advice on the various methods of contraception available.

Joan B. Forsberg, a housewife and mother of three children living with her family in New Haven, upon learning of the existence of the Center, arranged for an appointment at the Center which was made for November 8, 1961 and on that date she went to the Center as a patient, seek-

ing contraceptive advice, where she had her case history taken by a receptionist, attended an orientation session at which the defendant Estelle T. Griswold instructed her and other women as to the various methods of contraception available at the Center and told the patients they could choose the method they would individually prefer and be furnished with the necessary materials if the doctor approved, was given a pelvic examination by a staff doctor, was told by the staff doctor that the anti-ovulation pill method of contraception which she had chosen was all right [fol. 36] for her to use, was instructed by the doctor in its use, was thereafter given a supply of sixty anti-ovulation pills by the person on duty at the registration desk at the direction of the defendant Estelle T. Griswold, and before leaving paid a fee to the Center and was told to return to the Center in two months. After her visit to the Center, Mrs. Fosberg used approximately thirty of the pills furnished to her at the Center, for the purpose of preventing conception.

On November 7, 1961, one Marie Wilson Tindall, a housewife and mother of several children, living with her family in New Haven, after having made an appointment beforehand, went to the Center with her husband in order to obtain information concerning contraception. She had her case history taken by the receptionist, attended an orientation session with other patients at which were described the various types of contraceptives available at the Center, was given a pelvic examination by a staff doctor, told the doctor that she had chosen a diaphragm as the type of contraceptive she wished to use, was fitted and given by the doctor a diaphragm and accompanying articles and thereafter was instructed by one of the personnel in how to use them, and before leaving paid a fee of \$7.50 to the Center. After her visit to the Center, Mrs. Tindall used the diaphragm and other articles furnished to her at the Center for the purpose of preventing conception.

On November 9, 1961, one Rosemary Anne Stevens, a young student married nearly a year and living with her husband in New Haven having made an appointment, went to the Center seeking to obtain contraceptive advice addi-

tional to that previously obtained by her in England. While at the Center she had her case history taken by the defendant Estelle T. Griswold, attended an orientation session at which the defendant Estelle T. Griswold described the methods of contraception available at the Center, was given a pelvic examination by the defendant Dr. C. Lee Buxton acting as a staff doctor on that day at the Center, was advised by him that the method of contraception which she had been using and had chosen was satisfactory for her, was given instruction by him as to its use, and, before leaving the Center was given a tube of contraceptive jelly by the defendant Estelle T. Griswold and paid a fee of \$15.00 to the Center. After her visit to the Center, the said Mrs. Stevens used this jelly for the purpose of preventing conception.

The defendant C. Lee Buxton served as medical director of the Center and furnished, at the Center, medical advice [fol. 37] to married women as to the use of drugs, contraceptive articles and materials and instruments for the purpose of preventing conception because in his judgment, based on the overwhelming opinion of medical experts in this country, this type of advice is an aspect of medical care which it is the responsibility of every doctor to furnish when in his opinion the patient should have it, and he therefore felt justified as a medical doctor in giving such advice and instruction.

It is the opinion of doctors who practice and specialize in the practice of obstetrics and gynecology in the city of New Haven and in the state of Connecticut, that it is accepted medical practice for a physician to advise a woman suffering from a serious medical condition such as hypertensive cardiovascular heart disease that pregnancy would be detrimental to her health and that she should avoid such pregnancy. Mrs. Griswold served as administrative director of the Center and participated in its operation because she felt that medically prescribed methods of contraception should be made available to the married women of Connecticut in order that they might protect their health as mothers, the emotional and economic stability of their families and promote responsible parenthood.

The issues of constitutionality of § 53-32, raised by demurrer, and urged in the trial and on appeal are fundamentally not new. The statute had been declared as not violative of the Fourteenth Amendment by our Supreme Court of Errors in a number of cases presenting a variety of factual situations, including those described in the foregoing recital. In those cases were involved alleged violations of the same constitutional rights that are the subject of main concern in this appeal. *Buxton v. Ullman* (and companion cases), 147 Conn. 48, 156 A. 2d 508, 367 U. S. 497, 6 L. Ed. 2d 989, (appeals dismissed for absence of justifiable controversy); *Trubeck v. Ullman*, 147 Conn. 633, 165 A. 2d 158, 367 U. S. 907, 6 L. Ed. 2d 1249, (appeal dismissed, certiorari denied); *Tileston v. Ullman*, 129 Conn. 84, 26 A. 2d 582; 318 U. S. 44, 87 L. Ed. 603, (appeal dismissed, "no standing"); *State v. Nelson*, 126 Conn. 412, 11 A. 2d 856. It has been repeatedly stated that § 53-32 is a valid exercise of the police power of the state; that no exceptions could be injected into the statute to allow physicians to advise and prescribe the use of contraceptive devices for use by married women; that such use was not permissible even in situations where, in the opinion of a competent physician the "general" health and well-being of the patient required [fol. 38] it or pregnancy posed a real and immediate threat to the life and health of the patient. See *Buxton v. Ullman*, supra, 51-54, 55, and cases cited; *Trubek v. Ullman*, supra, 655.

The chief contention of the defendants, relating to their conviction as accessories, is that (1) § 53-32 could not be applied constitutionally to penalize the actions of the three married women, as described above; therefore, (2) there were no substantive offenses committed by them to which the defendants could have been accessories. It is unquestionably the law that an offense must have been committed before a person can be charged as accessory to its commission, *State v. Wakefield*, 88 Conn. 164, 175. That does not mean that the principal offender must have been first convicted or even prosecuted, *State v. Gargano*, 99 Conn. 103, 109. The test is whether one charged as an accessory shared in the unlawful purpose and knowingly and willfully

assisted the perpetrator in the acts which prepared for, facilitated or consummated the offense. *State v. Pundy*, 147 Conn. 7, 11.

Much of the defendants' brief dealing with the commission of the substantive offense, is directed toward an attack on the constitutionality of the statute because of its invasion of the freedom of conjugal felicity which married couples, by the natural order of society, are entitled to enjoy. It is stated that enforcement of the statute would result in an invasion of privacy, a violation of the sanctities of the home and a gross intrusion into the most sacred area of life. These rights and freedoms are protected both by our federal and state constitutions and there is no suggestion in the record or in the evidence that they have been invaded. They are the rights guaranteed to the married persons involved and not the rights of these defendants. *Tileston v. Ullman*, 318 U. S. 44, 46, 87 L. Ed. 603, 604.

The necessary proof of the offense was supplied by the voluntary testimony of the three married women. This evidence was not coerced nor was it illegally or surreptitiously obtained. It was also found indisputably that the defendants performed the various acts described above in assisting, abetting and counselling the use of contraceptives by each of these women and that the contraceptive devices and materials were so used. That was the acknowledged purpose of the clinic in the operation of which the defendants admittedly participated. There was no error in overruling the demurrers and the conclusion of the court that the defendants were guilty under the cited statutes must stand.

[fol. 39] The next main contention of deprivation of constitutional rights relates to the claim of the defendant Dr. Buxton that in giving the advice he did he was conscientiously discharging his duties as a competent physician and a recognized authority in the field of obstetrics and gynecology; and depriving him of this right is a denial of his constitutional guarantee to freedom of speech in violation of the first and fourteenth amendments to the constitution of the United States and Article First, §§ 5 and 6, of the Constitution of Connecticut. This claim had not been expressly asserted in the earlier cases cited above; we are not

warranted in concluding, however, that this omission was due to oversight on the part of court and counsel or a knowing fragmentation of constitutional issues to be reserved for later presentation. The rule in *Buxton v. Ullman*, 147 Conn. 48, 51-55, appears to be inclusive of the claim now being separately presented as a curtailment of freedom of speech, that is particularly so because there can be no practical separation of facts to divide the acts of prescribing and furnishing the contraceptive materials and the words and speech accompanying such acts. Both were part of the practice of medicine which, to the extent inhibited by the statute in question, must yield to the police power of the state. *State v. Nelson*, 126 Conn. 412, 422.

In view of the decisions of our Supreme Court of Errors, which we must consider as controlling, we regard the remaining arguments addressed to the alleged unconstitutional aspects of § 53-32, as a recapitulation of what our courts have already considered declared to be matter for legislative rather than judicial consideration. Our examination of the records and briefs in the former cases confirms our belief that not only the same or nearly identical claims of law but also substantially similar comments and opinions, liberally quoted from medical and religious sources, had been urged upon our courts and the answer has been the same. See *State v. Nelson*, supra, Conn. Supreme Court Rec. & Briefs, A-144; *Tileston v. Ullman*, supra, Conn. Sup. Ct. Rec. & Briefs, A-172; *Buxton v. Ullman*, supra, Conn. Sup. Ct. Rec. & Briefs, A-380; *Trabek v. Ullman*, supra, Conn. Sup. Ct. Rec. & Briefs, A-391.

Every general law, in its ultimate objective, is declaratory of public policy. The wisdom or unwisdom of legislation is not subject to judicial examination unless it so interferes with rights of individuals as to require judicial intervention for their protection. The possibility or present predictability of failure in the legitimate aims of a legislative enactment, or even a previsive estimate of futility in the attempt, does not pose a question for judicial determination. *State v. McKee*, 73 Conn. 18, 30. A law, to be held unconstitutional, must be plainly violative of some constitutional mandate and admit of no other reasonable

construction. "Whatever may be our own opinion regarding the general subject, it is not for us to say that the legislature might not reasonably hold that the artificial limitation of even legitimate child-bearing would be inimical to the public welfare and, as well, that the rise of contraceptives, and assistance therein or tending thereto, would be injurious to public morals . . . *State v. Nelson*, supra, 424.

It is not alone for the preservation of morality in the religious sense that the legislature may have been impelled to act, but also for the perpetuation of race and to avert those perils of extinction of which states and nations have been alertly aware since the beginning of recorded history. Each civilized society has a primordial right to its continued existence and to the discouragement of practices that tend to negate its survival.

The record is bare of any showing that the law imposes any restraints on the protected liberties and the guaranteed rights of the defendants; and the merely notional, metaphysical or moral constraints, to which its preventive force is directed, are not such as to fall within constitutional prohibitions.

The remaining assignments of error are directed toward rulings excluding certain proffered evidence and the denial of one paragraph of the motion to correct the finding. What has been said above and the decisions referred to herein support the correctness of the court's rulings.

The questions involved are deemed to be of great public importance and it is found that there are substantial questions of law which should be reviewed by the Supreme Court of Errors, namely:

1. Have the defendants been denied their rights to liberty and property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States?

2. Have the defendants been denied their rights to freedom of speech and communication of ideas under the First and Fourteenth Amendments to the Constitution of the United States and Sections 5 and 6 of Article first of the Constitution of Connecticut?

[fol. 41] There is no error; the case is certified to the Supreme Court of Errors.

In this opinion PRUYN and DEARINGTON, Js. concurred.

FOOTNOTE

1. Sec. 53-32. USE OF DRUGS OR INSTRUMENTS TO PREVENT CONCEPTION. Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned."

2. "Sec. 54-196. ACCESSORIES. Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender."

The foregoing is a true copy of the original opinion as filed with the Chief Clerk of the Circuit Court, but the opinion is subject to alteration and addition by the Judges until printed in the Connecticut Supplement.

Elliott R. Katz, Chief Clerk.

IN THE CIRCUIT COURT OF CONNECTICUT,
APPELLATE DIVISION

At a session of the Appellate Division of the Circuit Court
held at New Haven in the State of Connecticut on October
19, 1962

On appeal from Circuit Court, Sixth Circuit

File No. CR 6-5653 AP

STATE OF CONN.

vs.

ESTELLE T. GRISWOLD

File No. CR 6-5654 AP

STATE OF CONN.

vs.

C. LEE BUXTON

JUDGMENT

This appeal by the defendants, Estelle T. Griswold and C. Lee Buxton from the judgment of said Circuit Court Sixth Circuit was taken on the 12th day of January 1962.

On the 26th day of September 1962, the appellant filed his assignments of error claiming errors of law in the record, judgment, proceedings and decision of said Court as [fol. 42] may appear in the record on file in said Court, and said appeal came to this session of the Appellate Division on October 9, 1962, when the parties appeared.

This Court, having heard the parties, finds that in the record, judgment, proceedings and decisions of said Court there is NO error, and certified to the Supreme Court of Errors.

Judgment entered January 7, 1963 By the Court,
January 18, 1963.

Paul M. Foti, Clerk.

IN THE SUPREME COURT OF ERRORS
OF THE
STATE OF CONNECTICUT

Circuit Court of Connecticut, Appellate Division

File Numbers CR 6-5653 AP
CR 6-5654 AP

STATE OF CONNECTICUT

vs.

ESTELLE T. GRISWOLD
AND C. LEE BUXTON

PETITION FOR CERTIFICATION BY SUPREME COURT OF ERRORS

Appellate Panel: KOSICKI, J., PRUYN, J., DEARINGTON, J.

To the Honorable Chief Justice and Associate Justices
of the Supreme Court of Errors:

Defendants Estelle T. Griswold and C. Lee Buxton respectfully show:

Statement of This Case

Defendants were arrested on November 10, 1961, on informations issued by the prosecuting attorney for the Circuit Court, Sixth Circuit, charging in essentially the same language that each defendant "did assist, abet, counsel, cause and command certain married women to use a drug, medicinal article and instrument for the purpose of preventing conception . . . and that thereafter said married women in consequence of said conduct did in fact use said [fol. 43] drugs, medicinal articles and instruments for the purpose of preventing conception", in violation of Sections 53-32 and 54-196 of the General Statutes of Connecticut.

Demurrers were filed to each of these informations on the grounds that the application of these statutes to the actions of these defendants was unconstitutional because it constituted (1) a denial of defendants' rights to liberty and

property without due process of law in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States and (2) a denial of defendants' rights to freedom of speech and communication of ideas under the First and Fourteenth Amendments to the Constitution of the United States and Sections 5 and 6 of Article First of the Constitution of the State of Connecticut.

The demurrers were overruled, the defendants pleaded not guilty to the informations and were tried to the Court, (Lacey, J.), and found guilty. Fines of \$100. were imposed on each defendant.

In essence the evidence on which these convictions were based was that the defendant Griswold and the defendant Buxton were respectively the administrative director and the medical director of a center operated from November 1 through November 10, 1961, in New Haven, where married women sought and obtained information and medical advice as to the use of contraceptives, and obtained such contraceptives as were medically approved for them at the center, and that these married women thereafter used these contraceptives to prevent conception in their marital relations with their spouses.

Defendants appealed from the judgments entered. A finding was filed by the Court. A motion to correct this finding filed by the defendants was granted in part. Defendants then filed a lengthy assignment of errors which were pursued in the appeal.

The appellate panel found no error in the judgments of the trial court but certified to this Court for review two of the questions raised by the defendants in their assignment of errors. These are the two constitutional questions posed by defendants in their demurrers, as set forth above.

The Questions Presented by This Petition

In their brief in the court below, defendants summarized the assignments of error urged as issues in the appeal by asking whether the Court erred:

[fol. 44] 1. In finding that offenses were committed in violation of the provisions of Section 53-32 of the General Statutes of Connecticut when married women

used contraceptives for the purpose of preventing conception?

2. In finding that the appellants assisted the commission of such offenses by supervising and participating in the operation of a medical center where these married women sought and obtained these contraceptives and medical advice concerning the same?

3. In finding that the specific speech and conduct of these defendants constituted assisting, abetting, counselling, causing and commanding these married women to commit these offenses?

4. In failing to find that the application of Sections 53-32 and 54-196 of the General Statutes to the actions of these defendants violated their rights to freedom of speech and to life, liberty and property without due process of law, in violation of the provisions of the Constitutions of the United States and the State of Connecticut?

5. In failing to conclude that the defendant Dr. Buxton was required by the accepted standards of the medical profession to commit the actions which he did?

6. In failing to admit expert medical testimony as to the accepted standards of the medical profession in Connecticut and elsewhere as to the use and prescription of contraceptives?

7. In failing to admit testimony as to the availability of contraceptives in Connecticut?

8. In failing to conclude that the defendants were not guilty of the crime charged?

As can be seen, paragraph #4 above combines in one question the two questions raised by defendants in their demurrers and now certified to this Court for review by the Appellate Panel. Although some of the others may by inference be deemed to be encompassed within the broad constitutional questions already certified, the defendants urge that for the sake of clarity as well as the reasons urged

below, all of the questions as stated above be certified for review by this Court.

[fol. 45] The Reasons Why Certification of These Questions Should Be Granted

I.

As is recognized by the Appellate Panel in its opinion (see pages 7-8 thereof), one of the main arguments pressed throughout by the defendants is that they cannot be charged as "accessories" to the commission of an act which is itself not an "offense", and that there is no substantive offense charged or proven here; since the use by married women of drugs, medicinal articles and instruments to prevent conception in their marital relations cannot be constitutionally be held to come within the purview of permissible legislative action.

The Appellate Panel seeks to dispose of this part of the argument by reference to the holding of *Tileston v. Ullman*, 318 U.S. 44, that one cannot assert the unconstitutionality of a statute because of its infringements of the constitutional rights of those other than those making the assertion, and further by holding that the commission of the "offense" here was proven by the voluntary testimony of married women that they did in fact use certain drugs or articles for the purpose of preventing conception.

This, however, begs defendants' argument. We submit that use by married women of such articles to prevent conception is not in any event, because it cannot constitutionally be, a criminal offense, and that thus evidence as to the use by married women of these articles for this purpose does not establish the commission of an offense. If this be correct, it follows that the application of the accessory statute in such manner as to penalize defendants for assisting and advising these married women to do acts which are not unlawful deprives defendants of their own constitutional rights to liberty and property without due process of law.

Defendants have a real and substantial interest in the determination of the question of the constitutionality of the application of the substantive statute to the actions of

married. On the determination of this question may hang the ultimate determination of their own criminal guilt or innocence of the charges on which they were convicted in the lower court. Such an interest entitles defendants to an adjudication of the question in this appeal.

[fol. 46] The presentation and determination of the question may of course be encompassed within the first question certified to this Court by the Appellate Panel—whether application of these statutes to the defendants violates their rights to liberty and property without due process of law under the Fourteenth Amendment to the Constitution of the United States. The Appellate Panel, in its opinion here, recognizes that married persons do have a right of privacy and a “freedom of conjugal felicity” guaranteed by both our state and federal constitutions. (Opinion at page 8). However, the panel seems to conclude that these do not constitutionally preclude or negate legislation within the constitutionally protected area, but only serve as a bar to prosecution. It is with this conclusion that defendants disagree. Cases are almost too numerous to mention in which statutes have been held to be unconstitutional because of their invasion of protected rights. See, for instance, *Cantwell v. Connecticut*, 310 U.S. 296 (1939). *Meyer v. Nebraska*, 262 U.S. 390 (1922), *State v. Miller*, 126 Conn. 373 (1940), *Hart v. Board of Medical Examiners*, 129 Conn. 128 (1942). The objections posed to the substantive statute here are more than merely procedural—if sustained, the application of the law to the acts of married persons would be held to be unconstitutional and there would be no “offense” to which defendants could be accessories.

The nature and scope of these rights of married persons, the extent and propriety of their invasion by the substantive statute here before the Court, and the standing of these defendants to assert them are substantial questions which should be clearly before the Court in its consideration of this appeal.

II.

The defendants also assigned, as error and argued at length below the question of whether the accessory statute, Section 54-196 of the General Statutes of Connecticut, was

properly applied by the Trial Court to the actions of the defendants in supervising and participating in a clinic where married persons could seek and obtain information and medical advice relative to contraceptives and, under medical supervision and prescription, the contraceptives themselves.

In part this argument is closely allied with, but not necessarily fully encompassed by the questions certified by the Appellate Panel to this Court.

[fol. 47] Thus the words of the information charging defendants here as accessories states in the words of the statute that they did "counsel, cause and command" others to do certain acts. Quaere—do the words and expressions of the defendants which constitute such "counselling and commanding" fall within the area of constitutionally protected speech and expression?

Whether or not they do, however, defendants submit that their words and actions on which their convictions were here sustained do not constitute that active encouragement, solicitation and incitement which are required for conviction by the statutory and charging words "counsel, cause and command". See, for instance, *United States v. Peoni*, 100 F. 2d 401, 402 (2nd Cir., 1938); *State v. Teahan*, 50 Conn. 92 (1882); *State v. Scott*, 80 Conn. 317, 323 (1907).

It was further argued at length below that defendants' actions do not constitute as a matter of law "assisting and abetting" the commission of an offense, within the meaning of those words as used in the accessory statute and the informations here. Thus, for instance, it has been held that furnishing others with the instruments with which an offense is later committed is not necessarily sufficient to establish one as an accessory to the offense, especially where such instruments are freely available elsewhere. *United States v. Falcone*, 109 F. 2d 579, 581 (2nd Cir., 1940); *State v. Scott*, supra at pages 323-324.

Even more, essential to a finding of guilt under our accessory law is the existence of "criminal intent and (a) community of unlawful purpose shared by one who knowingly and wilfully assists the perpetrator of the offense". *State v. Pundy*, 147 Conn. 7, 12 (1959). Defendants submit that the evidence here does not establish such an intent on

their part. The extent to which the actions of married persons may be subject to the prohibitions of the substantive statute itself raises doubts as to whether there may be that "community of unlawful purpose" between the defendants and these married persons. So, too, the actions here of the defendant Buxton, a physician, were in his opinion required in the proper pursuit of his professional obligations, a fact belying criminal intent on his part. Similarly, the aid given by the defendant Griswold to him in the performance of his professional duties cannot be more criminal.

These assignments of error and arguments of the defendants relative to the scope and applicability of our [fol. 48] accessory law to the facts of this case are not even touched upon by the Appellate Panel in its decision. The defendants urge that they should be considered by this Court since they are so intertwined with the questions already certified and further since they involve important questions which call for further clarification in our law.

III.

The Appellate Panel dismissed out of hand certain of the defendant's assignments of error addressed to rulings upon evidence.

One group of these relates to the exclusion by the trial court of defendants' proffers of expert medical evidence as to the accepted standards of the profession in Connecticut and elsewhere as to the use and prescription of contraceptives.

Defendants submit that this evidence would have been relevant (1) to the questions raised by the defendant Buxton as to whether application of the statutes here in such manner as to penalize his actions in the performance of his professional duties was constitutionally permissible, and (2) to the question of whether there was that "criminal intent and community of unlawful purpose" present on the part of these defendants necessary to sustain their convictions as accessories.

The other evidentiary question raised in the appeal related to the refusal of the trial court to permit defendants to ask questions of a police witness on cross-examination as

to the general availability of contraceptives in New Haven. Such evidence would have been relevant to counter the charge of being an accessory, as discussed briefly under II. above.

The refusal of the trial court to permit this evidence, and the failure of the Appellate Panel to deal with these assignments of error raise important problems on the appeal. Defendants urge this Court to consider these questions on this appeal, not only because they are closely related to the other questions in this case, but also in accordance with their general supervisory powers over the administration of justice in the Courts of this State.

IV.

Finally defendants have raised a question of the sufficiency of the evidence to sustain their convictions. Since [fol. 49] this is so interrelated with all of the other arguments and questions already certified or which as a result of this petition may be certified for review by this Court, it is urged that this question be certified as well.

Wherefore the defendants pray, for the reasons set forth herein that this Court grant certification of all questions raised on this appeal.

Dated at New Haven, Connecticut, this 31st day of January, 1963.

Respectfully submitted,

Catherine G. Roraback, Attorney for Defendants-Petitioners.

I hereby certify that the foregoing petition presents substantial questions meriting certification, and that it is filed in good faith and not for purposes of delay.

Dated at New Haven, Connecticut, this 31st day of January, 1963.

Catherine G. Roraback, Attorney for Defendants-Petitioners.

Certificate of Service (omitted in printing).

IN THE SUPREME COURT OF ERRORS
OF THE STATE OF CONNECTICUT

Nos. CR6-5653 AP
CR6-5654 AP

STATE OF CONNECTICUT

vs.

ESTELLE T. GRISWOLD
AND C. LEE BUXTON

ORDER GRANTING CERTIFICATION—February 19, 1963

The defendants have filed a petition for certification and the court having considered said petition finds that it should be granted.

[fol. 50] Whereupon it is ordered that said petition be and it hereby is granted.

By the Court,

Raymond G. Calnen, Clerk.

Clerks' Certificates to foregoing transcript (omitted in printing).

[fol. 52]

IN THE SUPREME COURT OF ERRORS
OF THE STATE OF CONNECTICUT

November Term, 1963

STATE OF CONNECTICUT

v.

ESTELLE T. GRISWOLD

STATE OF CONNECTICUT

v.

C. LEE BUXTON

Informations charging the defendants with the crime of assisting and abetting the use of drugs, medicinal articles and instruments for the purpose of preventing conception, brought to the Circuit Court in the sixth circuit and tried to the court, Lacey, J.; judgment of guilty in each case which, on appeal, the Appellate Division of the Circuit Court affirmed; from its judgment the defendants, on the granting of certification, appealed to this court. No error.

Catherine G. Roraback, for the appellants (defendants).

Julius Maretz, prosecuting attorney, and Joseph B. Clark, assistant prosecuting attorney, for the appellee (state).

OPINION

COMLEY, J. After a trial to the court in the Circuit Court for the sixth circuit at New Haven, the defendants were found guilty as accessories to certain violations of General Statutes § 53-32, which appears with the statute on accessories in the footnote.¹ The principal offenders were not

¹ "Sec. 53-32. *Use of Drugs or Instruments to Prevent Conception.* Any person who uses any drug, medicinal article or instru-

[fol. 53] prosecuted. The convictions of the accessories were sustained by the Appellate Division of the Circuit Court, which, at the same time, certified that there were substantial questions of law which should be reviewed by this court. These questions, together with others certified by us, are now before us on this appeal.

There is no significant dispute about the facts. In November, 1961, The Planned Parenthood League of Connecticut occupied offices at 79 Trumbull Street in New Haven. For ten days during that month the league operated a planned parenthood center in the same building. The defendant Estelle T. Griswold is the salaried executive director of the league and served as acting director of the center. The other defendant, C. Lee Buxton, a physician, who has specialized in the fields of gynecology and obstetrics, was the medical director of the center. The purpose of the center was to provide information, instruction and medical advice to married persons concerning various means of preventing conception. In addition, patients were furnished with various contraceptive devices, drugs or materials. A fee, measured by ability to pay, was collected from the patient. At the trial, three married women from New Haven testified that they had visited the center, had received advice, instruction and certain contraceptive devices and materials from either or both of the defendants and had used these devices and materials in subsequent marital relations with their husbands. Upon these facts, there is no doubt that, within the meaning of § 54-196 of the General Statutes, the defendants did aid, abet and counsel married women in the commission of an offense under § 53-32.

Section 53-32, enacted in 1879 (Public Acts 1879, c. 78), has been under attack in this court on four different occasions in the past twenty-four years. *State v. Nelson*, 126 Conn. 412, 11 A.2d 856; *Tileston v. Ullman*, 129 Conn. 84,

ment for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned."

"Sec. 54-196. *Accessories*. Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender."

26 A.2d 582; *Buxton v. Ullman*, 147 Conn. 48, 156 A.2d 508; *Trubek v. Ullman*, 147 Conn. 633, 165 A.2d 158. An examination of these cases discloses that every attack now made on the statute, standing by itself or when considered in combination with § 54-196, has been made and rejected in one or more of these cases, the last two having been decided within the past five years. The defendants virtually concede this fact in the closing paragraph of their brief where they urge this court "to consider whether or not in the light of the facts of this case, the current developments in medical, social and religious thought in this area, and the present conditions of American and Connecticut life, modification of the prior opinions of this Court might not 'serve justice better.'" A-427 Rec. & Briefs 616. In rejecting this claim we adhere to the principle that courts may not interfere with the exercise by a state of the police power to conserve the public safety and welfare, including health and morals, if the law has a real and substantial relation to the accomplishment of those objects. The legislature is primarily the judge of the regulations required to that end, and its police statutes may be declared unconstitutional only when they are arbitrary or unreasonable attempts to exercise its authority in the public interest. See *State v. Nelson*, supra, 422, and cases cited in *Buxton v. Ullman*, supra, 59. Furthermore, as pointed out in *Buxton v. Ullman*, supra, 56-59, the General Assembly has not recognized that the interest of the general public calls for the repeal or modification of the statute as heretofore construed by us. It is our conclusion that the conviction of the defendants was not an invasion of their constitutional rights.

The rulings on evidence and on the motion to correct the finding, of which the defendants complain, do not merit discussion.

There is no error.

In this opinion the other judges concurred.

[fol. 54]

IN THE SUPREME COURT OF ERRORS
OF THE STATE OF CONNECTICUT

At a Supreme Court of Errors held at Hartford on the first Tuesdays of November AD 1963.

Present, Hon. John H. King, Chief Justice, Hon. James E. Murphy, Hon. William J. Shea, Hon. Howard W. Alcorn, Hon. John M. Comley, Associate Judges.

STATE OF CONNECTICUT

vs.

ESTELLE T. GRISWOLD, of New Haven, Connecticut

and

C. LEE BUXTON, of New Haven, Connecticut

On Appeal from the Judgment of the Appellate Division of the Circuit Court.

JUDGMENT—April 28, 1964

This appeal by the defendants claiming error in the process, record and judgment, and in the proceedings and decisions of the Circuit Court, 6th District on questions of law arising in the trial, as may appear in the certified transcript of record and findings of facts, on file in this Court, was allowed by the Circuit Court, 6th District, in New Haven County, on January 12, 1962 and came to the Appellate Division of the Circuit Court on October 9, 1962 when the parties appeared and were fully heard by said Appellate Division of the Circuit Court and thence to January 7, 1963 when said Appellate Division of the Circuit Court found No Error in the decision of the Circuit Court, 6th District, thence to January 31, 1963 when the defendants filed a Petition for certification by the Supreme Court of Errors and a statement of the case, thence to February 19, 1963 when said Petition was granted and said case came to this Court at its term held at Hartford, on the first Tuesday in February, A. D. 1963, and thence by continuance to the

present term, when the parties appeared and were fully heard.

And now this Court finds that in the record, judgment and proceedings of said Appellate Division of the Circuit Court there is no error.

It is therefore considered and adjudged that said judgment be confirmed and established and that the appellee recover of the appellants its costs taxed at \$.....

Date of judgment, April 28, 1964.

By the Court,

Edward Horwitz, Clerk.

[fol. 55] Clerk's certificate to foregoing papers (omitted in printing).

[fol. 56]

IN THE SUPREME COURT OF ERRORS
OF THE STATE OF CONNECTICUT

No. 5485

STATE OF CONNECTICUT, Appellee

vs.

ESTELLE T. GRISWOLD, Appellant

STATE OF CONNECTICUT, Appellee

vs.

C. LEE BUXTON, Appellant

NOTICE OF APPEAL TO THE SUPREME COURT OF THE
UNITED STATES—Filed July 22, 1964

I. Notice is hereby given that Estelle T. Griswold and C. Lee Buxton, appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of Errors of Connecticut, dated

and entered on April 28, 1964, affirming a judgment of the Circuit Court, Appellate Division which had affirmed a judgment of conviction of the Circuit Court, Sixth Circuit, against appellant.

This appeal is taken pursuant to 28 U. S. C. Section 1257(2).

II. The clerk will please prepare a transcript of so much of the record as was used in this case by the Supreme Court of Errors for transmission to the clerk of the Supreme Court of the United States, including all pleadings, orders, judgments and opinions therein.

III. The following questions are presented by this appeal:

Whether Section 54-196 (the criminal accessory statute) and Section 53-32 (making it a criminal offense to use "any drug, medicinal article or instrument for the purpose of preventing conception"), General Statutes of Connecticut, 1958 Revision, are unconstitutional on their face or as applied to these appellants in this case, in that they deprive appellants of liberty and property without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States, that they deprive them of [fol. 57] freedom of speech contrary to the First and Fourteenth Amendments and that they invade the privacy and liberty of the women who testified that they received contraceptive advice and materials from these appellants, contrary to the Fourth, Ninth and Fourteenth Amendments to the Constitution of the United States.

Fowler V. Harper, Attorney for Appellants, 127 Wall Street, New Haven, Connecticut.

[fol. 58] Proof of Service (omitted in printing).

Clerk's certificate to foregoing paper (omitted in printing).

[fol. 59]

SUPREME COURT OF THE UNITED STATES

No. 496—October Term, 1964

ESTELLE T. GRISWOLD, *et al.*, Appellants,

v.

CONNECTICUT.

ORDER NOTING PROBABLE JURISDICTION—December 7, 1964

Appeal from the Supreme Court of Errors of the State of Connecticut.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

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In the
Supreme Court of the United States

OCTOBER TERM, 1964

No. **496**

ESTELLE T. GRISWOLD

AND

C. LEE BUXTON,

Appellants,

vs.

STATE OF CONNECTICUT,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF ERRORS OF CONNECTICUT

JURISDICTIONAL STATEMENT

FOWLER V. HARPER,

127 Wall Street,

New Haven, Connecticut,

Attorney for Appellants.

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In the
Supreme Court of the United States

OCTOBER TERM, 1964

No.

ESTELLE T. GRISWOLD
AND

C. LEE BUXTON,
Appellants,

vs.

STATE OF CONNECTICUT,
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF ERRORS OF CONNECTICUT

JURISDICTIONAL STATEMENT

Appellants Griswold and Buxton appeal from the judgment of the Supreme Court of Errors of Connecticut entered on April 28, 1964, affirming the judgment of the Circuit Court, Appellate Division which had affirmed the conviction of appellants by the Circuit Court, Sixth District. Appellants submit this statement to demonstrate that the Supreme Court of the United States has jurisdiction of this appeal in that there are substantial federal questions involved.

OPINION BELOW

The opinion of the Supreme Court of Errors of Connecticut rendered May 12, 1964, is reported in 25 Conn. L.J. #47, p. 5, 200 A.2d 479.

The opinion of the Supreme Court of Errors of Connecticut is set forth in the Appendix to this Statement.

JURISDICTION

On November 10, 1961, Julius Maretz, Prosecuting Attorney, Circuit Court of Connecticut, Sixth Circuit, filed Informations and Warrants against appellants, alleging violation of Sections 53-32 and 54-196 of the General Statutes of Connecticut, Revision of 1958, pursuant to which appellants were taken into custody and tried for such alleged violations. Appellants demurred to the Informations for the reason that the said statutes were in violation of the Constitution of the United States and the State of Connecticut both on their face and as applied to them.

The demurrers were overruled and the appellants, after hearing, were found guilty and sentenced to pay a fine of one hundred dollars (\$100.00) each on January 2, 1962.

After stipulation by the parties for joint appeals, and an order by the court therefor, on January 10, 1962, assignment of errors was made by appellants and an appeal taken to the Appellate Division of the Circuit Court which affirmed the judgment of the Circuit Court, Sixth Circuit in an opinion rendered on January 7, 1963.

The Appellate Division certified two questions and appellants on January 31, 1963, petitioned for certification of additional questions by the Supreme Court of Errors for review of the judgments below which was granted by that court on

February 19, 1963. Thereafter on April 28, 1964, the Supreme Court of Errors of Connecticut affirmed the judgment of the Circuit Court, Appellate Division. Stay of execution was ordered on May 20, 1964.

Notice of appeal to the Supreme Court of the United States was filed with the Supreme Court of Errors of Connecticut on July 22, 1964.

This appeal is authorized by and taken pursuant to 28 U.S.C. Section 1257(2). The court below held that the Sections 54-196 and 53-32 of the General Statutes of Connecticut, 1958 Revision were in conflict with the Constitution of the United States, neither on their face nor as applied to these appellants.

QUESTIONS PRESENTED

Whether Section 53-32, General Statutes of Connecticut, Revision of 1958 in connection with Section 54-196 of said statutes deprive these appellants and their patients of their liberty without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States, whether they deprive these appellants of their property and deny to them their rights to freedom of speech and the communication of ideas of great social significance as protected by the First and Fourteenth Amendments, and whether Section 53-32 is unconstitutional on its face and as applied to married patients of these appellants and other married couples because it is an unreasonable and unjustifiable invasion of their privacy contrary to the Fourth, Ninth and Fourteenth Amendments to the Constitution of the United States.

STATUTES INVOLVED

Statutes involved in this case are Section 53-32 and 54-196, General Statutes of Connecticut, Revision of 1958.

Section 53-32, General Statutes of Connecticut, Revision of 1958:

"Use of drugs or instruments to prevent conception. Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or both fined and imprisoned."

Section 54-196, General Statutes of Connecticut, Revision of 1958:

"Accessories. Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender."

STATEMENT OF THE CASE

Appellant Griswold was and is the Executive Director of the Planned Parenthood League of Connecticut and of the Center which it established in New Haven for the purpose of making available information and materials under medical supervision to prevent conception for those married women for whom the doctors in charge prescribed them. Appellant Buxton was the Medical Director of the aforesaid Center and is a registered licensed physician and a specialist in obstetrics and gynecology. He was formerly a professor in these specialties at the Columbia-Presbyterian Medical Center in New York and at present is professor and chairman, Department of Obstetrics and Gynecology at Yale University School of Medicine and the Grace New Haven Community Hospital.

Appellants were arrested and charged under Sections 54-196 as being accessories to violations of Section 53-32 Revised Statutes of Connecticut. Three patients testified that they went to the Center to seek medical advice, that they asked for and received materials in the nature of instruments and drugs to prevent conception, instructions from these appellants as to their proper use and that they returned to their homes, followed the instructions and used the said articles. Appellants were convicted over their objection that said Section 53-32 was in violation of the Constitution of the United States on its face, and in connection with Section 54-196, was in violation of the Constitution on its face and as applied to these appellants and their patients on the Constitutional grounds mentioned above. Since the arrest and conviction of these appellants, the Center established to dispense advice, information, materials and instructions under the supervision of physicians to married women for the purpose of preventing conception has ceased to function as such. Thus the women who, perhaps, most need this type of medical care are deprived of it, as suggested by Mr. Justice Brennan in his ~~dissent~~ in *Poe vs. Ullman*, 367 U.S. 497 (1961). See *Rainwater, And the Poor Get Children*, 49 ff. (1960).

THE QUESTIONS ARE SUBSTANTIAL

These cases raise fundamental questions of personal liberty and property rights which have never been passed upon by this Court. The statutes challenged regulate the practice of medicine in an arbitrary, unreasonable and unscientific manner which seriously restricts physicians in the practice of their profession and jeopardizes the lives and health of their patients. They also raise questions as to whether either or both appellants can be punished as accessories to the violation of a statute claimed by them to be unconstitutional as to their patients thus involving the issue of the constitutionality of Section 53-32 as

invading the privacy and liberty of the married women who went to the clinic to obtain medical aid, assistance and materials for the purpose of preventing conception and who thereafter followed the advice and used the materials thus obtained.

POINT I

These laws deprive appellants Buxton and Griswold of rights under the First and Fourteenth Amendments to the Constitution of the United States.

1. "The right of the Doctor to advise his patients according to his best lights seems so obviously within First Amendment rights as to need no extended discussion." Mr. Justice Douglas in *Poe vs. Ullman*, 367 U.S. 497 (1961). This Court in *Kingsley Pictures vs. Regents*, 360 U.S. 64 (1959) held unconstitutional New York's ban on the film of "Lady Chatterly's Lover" and in respect to the contention of the state that it could constitutionally forbid the advocacy of conduct (in this instance adultery) which it could validly make a crime, the Court declared, through Mr. Justice Stewart, "Its (First Amendment) guarantee is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single-tax. And in the realm of ideas it protects expression which is eloquent no less than that which is convincing." (Pages 688-689) The mere fact that the advice given is unorthodox or controversial or even hateful to the prevailing climate of opinion is no basis for its being forbidden by the state, if it has, as Mr. Justice Brennan has written, "the slightest redeeming social importance." *Roth vs. United States*, 354 U.S. 476, 484 (1957). Certainly, medical advice approved by those in the scientific world best qualified to judge cannot be curtailed by the state in the light of the First Amendment to the Consti-

tution and its applicability to the states under the Fourteenth Amendment.

First Amendment rights occupy a preferred position in our system of constitutional liberties. Whether this is to be interpreted as a presumption of unconstitutionality of legislation restricting speech or as diluting the burden of overcoming whatever presumption of constitutionality is applicable, is immaterial. The evidence to dissipate any presumption of constitutionality is overwhelming: To characterize the advice given by these appellants to the married women and others who visited the New Haven Clinic as of "the slightest redeeming social importance" is an understatement so gross as to be utterly misleading. The advice here prohibited has, in fact, importance of the highest degree to the women of Connecticut, to the nation and, indeed, to the world. Attention of the Court will be directed here only to the most important values of the prohibited advice, all of which appellants are prepared to document fully.

- (a) Use of effective contraceptive agencies are frequently necessary to the health of married women and occasionally to life. Under many types of circumstance pregnancy affects the mother's health adversely and childbirth threatens death.
- (b) Spacing of children is generally recognized as not only justifiable but highly desirable for socio-economic reasons as well as for the health of mother and child. To require women in underprivileged economic and social groups to have children or renounce sexual relations with their husbands creates and perpetuates poverty and conditions of disease and delinquency.
- (c) It is the opinion of qualified observers that lack of access to contraceptives leads to unwanted pregnan-

cies and substantially increases the frequency of illegal abortions.

- (d) It is the opinion of qualified observers that an increase in the use of effective contraceptive agencies substantially reduces the frequency of illegitimate births.
- (e) It is the opinion of qualified observers that the birth of unwanted children leads to their neglect, delinquency and to serious emotional disturbances.
- (f) The use of effective contraceptive agencies avoids the risk of failure of less effective methods such as the rhythm system and avoids the long recognized ill effects or prolonged or permanent abstinence from marital relations.
- (g) The work of these appellants in advising and giving instructions for the use of effective contraceptive agencies, is in line with and, indeed, promotes national policy as evidenced by the extensive research programs of the Public Health Service to develop the most effective contraceptive agencies and the policy of making available technical assistance, as a part of our foreign aid program, to the other nations seeking methods of population control. A federal program to abolish poverty has begun. But to fight poverty without birth control is to fight with one hand tied behind the back.
- (h) The work of these appellants will contribute to the reduction of the increased rate of population growth in the United States. Unless effectively controlled, within a half century, population in this country will rise from its present 190,000,000 to 1,000,000,000.

2. Both Dr. Buxton and Mrs. Griswold have a right to make a living which may not be unreasonably restricted by the state. Both are advocating matters long endorsed by the medical profession. As early as June 1937 the American Medical Association unanimously adopted the report of its committee to study contraceptive practices, recommending teaching contraception in medical schools, investigation of materials and methods, and clarification to physicians of their legal rights in this field. Among the many medical organizations which have since passed resolutions in favor of birth control by the use of devices most likely to be effective are: Section of Obstetrics, Gynecology and Abdominal Surgery of the American Medical Association; American Gynecological Association; American Neurological Association; American Medical Women's National Association; National Committee on Maternal Health; and a number of state medical societies including those of Alabama, Arizona, Colorado, Connecticut, Delaware, Florida, Georgia, Iowa, Maine, Michigan, Minnesota, North Carolina, Southern Oregon, South Carolina, Tennessee, Texas, and West Virginia. Several states are distributing contraceptive instructions and materials as part of their public health or welfare programs.

It has long since been established by physicians that the vaginal diaphragm and the condom and other mechanical or chemical devices as well as recently developed oral contraceptives and the intrauterine coil, all made illegal by the Connecticut law, are by far the most effective contraceptive agencies. See *Guttmacher*, Human Fertility, Volume 12, Number 1, March 1947; *Tietze*, Journal of the American Medical Association, Volume 140, Page 1265 (1949); *Holland*, British Obstetric and Gynecological Practice, Page 756-757 (1958); *Novak & Novak*, Text Book of Gynecology, Page 607 (1956). The State of Connecticut, by depriving Doctor Buxton of this

most valuable attribute of his property and liberty in his profession, namely, the right to advise his patients according to his scientific training, takes his property unreasonably and without due process of law. See *Meyer vs. Nebraska*, 262 U.S. 390, 399 (1923); *Burns Baking Company vs. Bryand*, 264 U.S. 504, 513 (1924); *England vs. Louisiana State Board of Medical Examiners*, 259 F.2d 626, 627 (1958). Of course, the state may impose reasonable regulations on the practice of medicine, but a law which permits a doctor to abort his patient to save her life but prohibits advice for the use of the most effective means of preventing pregnancy and death has a negligible claim to reasonableness.

POINT II

Neither appellant Griswold nor Buxton can be guilty as accessories to crimes which were never committed. In *Poe vs. Ullman*, 367 U.S. 497 (1961), Mr. Justice Harlan, concluding his dissent, said: "I would adjudicate these appeals and hold this statute (Section 53-32) unconstitutional insofar as it purports to make criminal the conduct contemplated by these married women. It follows that if their conduct cannot be a crime, appellant Buxton cannot be an accomplice thereto."

If it be argued that appellants are invoking the constitutional rights of others, viz. the three married women who testified that they sought, obtained and used the contraceptive advice and materials, it is sufficient to answer that this is one of the many situations in which such procedure is permissible. Appellants show that they have suffered direct and immediate injury. They have been prosecuted, convicted and sentenced as accessories. As such they were in the very words of Section 54-196, "prosecuted and punished as if [they] were the principal offenders."

In *Barrows vs. Jackson*, 346 U.S. 249 (1935), this Court held that Respondent could not be held liable in a state court for failure to honor restrictive covenant in the sale of land. Respondent was permitted to plead the constitutional rights of non-Caucasians, "unidentified, but identifiable," because he would himself sustain immediate injury and the constitutional rights of "non-Caucasians" impaired by a verdict against him. "Under the peculiar circumstances of this case," said the Court, "we believe the reasons which underlie our rule denying standing to raise another's rights" * * * are outweighed by the need to protect the fundamental rights which would be denied by permitting the damages action to be maintained." *Ibid.*, 257. The rights of the married women who are alleged to have committed the crime to which appellants have been convicted as accessories are certainly, as will be shown, as "fundamental" as those involved in the *Barrows* case and the injury to appellants (criminal conviction) more serious than a money judgment for damages. See also *Pierce vs. Society of Sisters*, 268 U.S. 510 (1925); *Joint Anti-Fascist Refugee Committee vs. McGrath*, 341 U.S. 123 (1951), Frankfurter concurring and Jackson concurring.

Any different result in this case would be intolerable. It would mean that the State of Connecticut could, as indeed it has, indirectly but indefinitely enforce an unconstitutional law and deprive married women of necessary medical care by prosecuting only alleged accessories.

The following points have been summarized in a valuable article in a recent law review where the author finds that this Court appears to be influenced on "standing" problems by four factors: (1) the interest of the party litigant, (2) the nature of the constitutional right asserted, (3) the relationship between the party litigant and the third parties whose constitutional rights are invoked, and (4) the practicability of asser-

tion of such rights by third parties in an independent action. *Sedler, Standing to Assert Constitutional Jus Tertii*, 71 Yale L.J. 599, 627 (1962).

The application of this analysis to the present case clearly points to the right of these appellants to assert the constitutional rights of the women. In the first place, they have standing in their own right. Sections 53-32 barring "use" in connection with Sections 54-196, the accessory statute, deprives them of rights under the First and Fourteenth Amendments. Unlike the appellant in *Tilston vs. Ullman*, 129 Conn. 84, 318 U.S. 44 (1943), these appellants are asserting rights personal to them. Again, the right of the persons not parties is one highest in the hierarchy of constitutional values — "the right most valued by civilized man." The relationship between appellants and their patients is an important professional one.

Finally and, perhaps, most important, as a practical matter, the rights of third parties will not be protected otherwise than through a criminal proceeding of this type. Mr. Justice Brennan in *United States vs. Raines*, 362 U.S. 17, 22 (1960), explained that "where as a result of the very litigation in question, the constitutional rights of one not a party would be impaired, and where he has no effective way to preserve them himself, the Court may consider those rights as before it." So too, Justice Harlan in *N.A.A.C.P. vs. Alabama*, 357 U.S. 49 (1958): "To limit the breadth of issues which must be dealt with in particular litigation, this Court has generally insisted that parties rely only on constitutional rights which are personal to themselves. . . . The principle is not disrespected where constitutional rights of persons who are not immediately before the Court could not be effectively vindicated except through an appropriate representative before the Court."

It would be hard to imagine a situation to which the above principle is more applicable. It is, as a practical matter im-

possible for the women who want and need the advice and care afforded by these appellants at the closed Clinic to get their constitutional claims directly before this Court for vindication. The recent decision under the Fourth and Fourteenth Amendments (*Mapp. vs. Ohio*, 367 U.S. 643 (1961)) and under the Fifth on self-incrimination (*Malloy vs. Hogan*, 84 Sp. Ct. 1487 (1964))—together with the husband-wife testimonial privilege, make successful prosecution for “use” under Section 53-32 of the Connecticut statutes highly improbable. Thus, these women cannot obtain the relief and medical care to which they are entitled unless their right thereto is vindicated in a prosecution under Section 53-32 in connection with Section 54-196, as in the present case.

POINT III

The law forbidding the use of contraceptive devices deprives married women in Connecticut of their liberty and their privacy, as protected by the Fourth, Fourteenth and Ninth Amendments to the Constitution of the United States.

1. If, as was declared in *Meyer vs. Nebraska*, 262 U.S. 390, 391 (1923), the term “liberty” includes freedom “to marry, establish a home, and bring up children,” it would seem necessarily to include the freedom to limit the number of children to those a married couple feel that they can bring up in decency and in health. How they arrive at a decision on this matter and the preventive means which they adopt is a matter of personal and intimate privacy. This law “reaches into intimacies of the marriage relationship,” wrote Mr. Justice Douglas in *Poe vs. Ullman*, 367 U.S. 497 (1961). “If we imagine the regime of full enforcement of the law,” he continued, “in the manner of Anthony Comstock, we would reach the point where search warrants issued and officers appeared in bedrooms to find out what went on. It is said that this is not that case.

And so it is not. But when the state makes 'use' a crime and applies the criminal sanction to man and wife, the state has entered the innermost sanctum of the home. If it can make this law, it can enforce it. . . . This is an invasion of the privacy that is implicit in a free society." Mr. Justice Harlan stated the proposition with equal forcefulness in his opinion in *Poe*. "This enactment," he wrote, "involves what, by common understanding throughout the English speaking world, must be granted to be a most fundamental aspect of 'liberty', the privacy of the home in its most basic sense"

2. In 1961 this Court decided that violation of the Fourth Amendment guarantee against unreasonable searches and seizures in a case involving the privacy of the home was forbidden to the states by the Fourteenth Amendment. *Mapp vs. Ohio*, 367 U.S. 643 (1961).

It is true that the Fourth Amendment thus made applicable to the states, with rare exceptions, forbids the physical entrance into the home by police officers unless a warrant has been issued by a magistrate on "probable cause". But as Mr. Justice Harlan pointed out in his opinion in *Poe vs. Ullman*, "It would surely be an extreme instance of sacrificing substance to form were it to be held that the constitutional principle of privacy against arbitrary official intrusion comprehends only physical invasions by the police. . . . But to my mind such a distinction is so insubstantial as to be captious: If the physical curtilage of the home is protected, it is surely as a result of solicitude to protect the privacies of the life within. Certainly the safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its pre-eminence as the seat of family life and the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted constitutional right."

3. The Ninth Amendment to the Constitution provides that "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." It is submitted that this Amendment, as directly applicable to the States or as made so by the Fourteenth, should be interpreted to protect aspects of what has been called the rights of privacy as a protection additional to that afforded by other Amendments. The framers of the Bill of Rights took care to provide protection against the two physical types of invasion of privacy with which they were most familiar, namely, the notorious Writs of Assistance by which the King's Officers ransacked at large through private homes in search of contraband imports, and the quartering of soldiers in private homes without the consent of the owner. But with the "progress" of time, the ingenuity of man has discovered many other and more subtle ways of harrassing his neighbor. Even before 1884, the government of Connecticut invaded the bedroom of married couples, making the State, literally, a "naked society." The founding fathers foresaw that this could happen and took care to provide against it in the Ninth Amendment. Certainly rights so closely akin to those which concerned the fathers should be included in the "rights retained by the people."

Indeed, the so-called "right of privacy" is a broad general term which in fact includes a number of "rights" or "interests." Actually one may regard the religious guarantees of the First Amendment as protecting an aspect of what could be called "privacy", that is, freedom of conscience and freedom from compelled religious conformity, such as saluting the flag in public schools or mumbling a prayer dictated by the schools. This is an important area which, as Justice Douglas has declared, "the First Amendment fences off from government." *Sherbert vs. Verner*, 374 U.S. 398, 412 (1963). There is, the interest in seclusion or what Justice Brandeis called the "right

to be let alone." There is the interest in freedom from wire tapping or other types of eavesdropping. The privilege against self-incrimination of the Fifth Amendment, in connection with the Fourth, as they run "almost into each other" protects another privacy interest. There is the interest that one has in his life history or in his likeness. This interest is quite different from the right to seclusion. It is what, perhaps, Judge Frank called the "right to publicity" rather than the "right to privacy." Then, too, there is the interest in freedom from disagreeable noises and odors which has long been recognized in the law of nuisance.

Most if not all of these so-called aspects of privacy have been protected by the common law, some of them for centuries. The rights which the three women who obtained advice from Dr. Buxton and his assistant, Mrs. Griswold, as involved in this case are certainly closely akin to other aspects of privacy specifically recognized in the Constitution and are, in many respects, far more important; namely, freedom from coerced marital conformity in the bedroom. There is State action as much and as effective when it requires private citizens to deny constitutional rights to other citizens as when it acts directly to impinge on those rights. The Ninth Amendment to the Constitution certainly was intended to protect some rights of the people. What more appropriate than the freedom here claimed for these women? In referring to the opinion of Lord Camden in what Mr. Justice Bradley called a landmark of English liberty and one on which the Fourth Amendment is based, the Justice declared that "the principles laid down in this opinion affect the very essence of the constitutional liberty and security. They reach farther than the concrete form of the case then before the Court with its adventitious circumstances; [the case was an action for trespass against several of the King's messengers, reported in 19 Howell's State Trials 1029, (1765)]

they apply to all invasions on the part of the Government and its employees of the sanctity of a man's home and privacies of life. It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property where that right has never been forfeited by his conviction of some public offense, — it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment." *Boyd vs. United States*, 116 U.S. 616, 630 (1885).

The "personal liberty" in the sense of the "right to be let alone" is perhaps the most important of all — "the right most valued by civilized men." "It is quite true," Dean Griswold has written, "that this phrase cannot be found in the Constitution. But it is implicit in many of the provisions of the Constitution and in the philosophic background out of which the Constitution was formulated. . . . The right to be let alone is the underlying theme of the Bill of Rights." *Griswold, The Right to be Let Alone*, 55 N.W.U.L. Rev. 216-217 (1960). It is submitted that the invasion of the interest of married spouses in the sanctity and privacy of their marital relations, involved in this Connecticut statute, is a violation of precisely the kind of "right" which the Ninth Amendment was intended to secure.

Professor Redlich, in an important article has pointed out that in interpreting both the Ninth and Tenth Amendments, "the textual standard should be the entire Constitution." "The original Constitution," he wrote, "and its amendments project through the ages the image of a free and open society. The Ninth and Tenth Amendments recognized — at the very outset of our national experience — that it was impossible to fill in every detail of this image. For that reason certain rights were reserved to the people. The language and history of the

two amendments indicate that the rights reserved were to be of a nature comparable to the rights enumerated." *Redlich, Are There Certain Rights . . . Retained by the People*, 37 N.Y.U.L. Rev. 787, 810 (1962). Certainly the aspects of privacy protected by the First, Third, Fourth and Fifth (privilege against self-incrimination) are comparable to the rights of the married women who sought medical instruction from these appellants.

POINT IV

These laws violate the Fourteenth Amendment rights of all parties concerned in that the restrictions are unreasonable because every justification for them under the police power of the state fails:

1. These laws are not narrowly drawn. They are not restricted to their presumed purpose which is to prevent meretricious relations between unmarried persons. They are also applicable to married spouses and thus they "burn down the house to roast the pig." *Butler vs. Michigan*, 352 U.S. 380 (1956).

2. The laws do not attain the desired results of preventing licentious relations between unmarried persons since the forbidden contraceptive devices may be obtained in practically all drug stores in the state. (See opinion by Justice Frankfurter in *Poe vs. Ullman, supra*.) It is assumed that they are thus available for the prevention of disease. See *Commonwealth vs. Corbitt*, 307 Massachusetts 608, 29 N.E. 2d 150 (1940); cited with apparent approval in *Tileston vs. Ullman*, 128 Conn. 84, 91 (1942).

CONCLUSION

The issues in these cases are of great importance to these appellants and their patients and of far-reaching importance to the medical profession. It is submitted that the First, Fourth, Ninth and Fourteenth Amendments to the Constitution forbid the State of Connecticut to enact laws which fly in the face of both common sense and science and which unreasonably and arbitrarily restrict physicians and clinic workers from giving and their patients from receiving the best medical advice and care available.

Respectfully submitted,

FOWLER V. HARPER,
127 Wall Street,
New Haven, Connecticut.

APPENDIX

Supreme Court of Errors

NOVEMBER TERM, 1963

STATE OF CONNECTICUT vs. ESTELLE T. GRISWOLD

-STATE OF CONNECTICUT vs. C. LEE BUXTON

Informations charging the defendants with the crime of assisting and abetting the use of drugs, medicinal articles and instruments for the purpose of preventing conception, brought to the Circuit Court in the sixth circuit and tried to the court, Lacey, J.; judgment of guilty in each case which, on appeal, the Appellate Division of the Circuit Court affirmed; from its judgment the defendants, on the granting of certification, appealed to this court. No error.

Catherine G. Roraback, for the appellants (defendants).

Julius Maretz, prosecuting attorney, and Joseph B. Clark, assistant prosecuting attorney, for the appellee (state).

COMLEY, J. After a trial to the court in the Circuit Court for the sixth circuit at New Haven, the defendants were found guilty as accessories to certain violations of General Statutes § 53-32, which appears with the statute on accessories in the footnote.¹ The principal offenders were not prosecuted. The

¹ "Sec. 53-32. *Use of Drugs or Instruments to Prevent Conception.* Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned."

"Sec. 54-196. *Accessories.* Any person who assists, abets, counsels, cause, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender."

convictions of the accessories were sustained by the Appellate Division of the Circuit Court, which, at the same time, certified that there were substantial questions of law which should be reviewed by this court. These questions, together with others certified by us, are now before us on this appeal.

There is no significant dispute about the facts. In November, 1961, The Planned Parenthood League of Connecticut occupied offices at 79 Trumbull Street in New Haven. For ten days during that month the league operated a planned parenthood center in the same building. The defendant Estelle T. Griswold is the salaried executive director of the league and served as acting director of the center. The other defendant, C. Lee Buxton a physician, who has specialized in the fields of gynecology and obstetrics, was the medical director of the center. The purpose of the center was to provide information, instruction and medical advice to married persons concerning various means of preventing conception. In addition, patients were furnished with various contraceptive devices, drugs or materials. A fee, measured by ability to pay, was collected from the patient. At the trial, three married women from New Haven testified that they had visited the center, had received advice, instruction and certain contraceptive devices and materials from either or both of the defendants and had used these devices and materials in subsequent marital relations with their husbands. Upon these facts, there is no doubt that, within the meaning of § 54-196 of the General Statutes, the defendants did aid, abet and counsel married women in the commission of an offense under § 53-32.

Section 53-32, enacted in 1879 (Public Acts 1879 c. 78), has been under attack in this court on four different occasions in the past twenty-four years. *State vs. Nelson*, 126 Conn. 412, 11 A.2d 856; *Tileston vs. Ullman*, 129 Conn. 84, 26 A.2d 582; *Buxton vs. Ullman*, 147 Conn. 48, 156 A.2d 508; *Trubek*

vs. *Ullman*, 147 Conn. 633, 165 A.2d 158. An examination of these cases discloses that every attack now made on the statute, standing by itself or when considered in combination with § 54-196, has been made and rejected in one or more of these cases, the last two having been decided within the past five years. The defendants virtually concede this fact in the closing paragraph of their brief where they urge this court "to consider whether or not in the light of the facts of this case, the current developments in medical, social and religious thought in this area, and the present conditions of American and Connecticut life, modification of the prior opinions of this Court might not 'serve justice better.'" A-427 Rec. & Briefs, 616. In rejecting this claim, we adhere to the principle that courts may not interfere with the exercise by a state of the police power to conserve the public safety and welfare, including health and morals, if the law has a real and substantial relation to the accomplishment of those objects. The legislature is primarily the judge of the regulations required to that end, and its police statutes may be declared unconstitutional only when they are arbitrary or unreasonable attempts to exercise its authority in the public interest. See *State vs. Nelson*, *supra*, 422, and cases cited in *Buxton vs. Ullman*, *supra*, 59. Furthermore, as pointed out in *Buxton vs. Ullman*, *supra*, 56-59, the General Assembly has not recognized that the interest of the general public calls for the repeal or modification of the statute as heretofore construed by us. It is our conclusion that the conviction of the defendants was not an invasion of their constitutional rights.

The rulings on evidence and on the motion to correct the finding, of which the defendants complain, do not merit discussion.

There is no error.

In this opinion the other judges concurred.

STATE OF CONNECTICUT

At a Supreme Court of Errors held at Hartford on the
first Tuesday of November A D 1963

Present HON. JOHN H. KING Chief Justice

HON. JAMES E. MURPHY
HON. WILLIAM J. SHEA
HON. HOWARD W. ALCORN
HON. JOHN M. COMLEY

Associate Judges

STATE OF CONNECTICUT

vs.

ESTELLE T. GRISWOLD, of New Haven,
Connecticut
and
C. LEE BUXTON, of New Haven, Con-
necticut

On Appeal
from the
Judgment of
the Appellate
Division of the
Circuit Court.

JUDGMENT

This appeal by the defendants claiming error in the process, record and judgment, and in the proceedings and decisions of the Circuit Court, 6th District on questions of law arising in the trial, as may appear in the certified transcript of record and finding of facts, on file in this Court, was allowed by the Circuit Court, 6th District, in New Haven County, on January 12, 1962 and came to the Appellate Division of the Circuit Court on October 9, 1962 when the parties appeared and were fully heard by said Appellate Division of the Circuit Court and thence to January 7, 1963 when said Appellate Division of the Circuit Court found no Error in the decision of the Circuit Court, 6th District, thence to January 31, 1963 when the defendants filed a Petition for certification by the Supreme Court

of Errors and a statement of the case, thence to February 19, 1963 when said Petition was granted and said case came to this Court at its term held at Hartford, on the first Tuesday in February, A.D. 1963, and thence by continuance to the present term, when the parties appeared and were fully heard.

And now this Court finds that in the record, judgment and proceedings of said Appellate Division of the Circuit Court there is no error.

It is therefore considered and adjudged that said judgment be confirmed and established, and that the appellee recover of the appellants its cost taxed at \$.....

Date of judgment, April 28, 1964.

By the Court,

/s/ EDWARD HORWITZ,

Clerk

STATE OF CONNECTICUT

Supreme Court of Errors

No. 5485

STATE OF CONNECTICUT

vs.

ESTELLE T. GRISWOLD

STATE OF CONNECTICUT

vs.

C. LEE BUXTON

APPLICATION FOR A STAY OF EXECUTION

To the HONORABLE JOHN HAMILTON KING, Chief Justice of
the State of Connecticut:

Estelle T. Griswold and C. Lee Buxton, the defendants and
appellants in the foregoing matter, respectfully represent:

1. On May 12, 1964, the Supreme Court of Errors of the
State of Connecticut issued its decision and judgment herein,
finding no error in the judgments below, under which judg-
ments fines of \$100.00 are to be imposed upon each of the de-
fendants.

2. An appeal by the defendants from the decision of the
Supreme Court of Errors will be taken to the Supreme Court
of the United States within the time limited by the rules of
said Court.

3. Such appeal will be taken in good faith and not for
purposes of delay.

4. Execution upon the sentences herein is stayed only to
May 22, 1964.

WHEREFORE the defendants, Estelle T. Griswold and C. Lee Buxton, move for a stay of execution of the sentences imposed herein to a date thirty days following the final decision of the Supreme Court of the United States upon the appeal to be taken by them to such Court from the decision of the Supreme Court of Errors of this State.

At New Haven, Connecticut, this 18th day of May, 1964.

The Defendants, ESTELLE T. GRISWOLD
and C. LEE BUXTON,

By CATHERINE G. RORABACK

Their Attorney

The undersigned, counsel for the State of Connecticut herein, have no objection to the granting of the foregoing application.

JOSEPH B. CLARK

Assistant Prosecuting Attorney

Circuit Court of Connecticut,
Sixth Circuit

ORDER

The foregoing application having been presented, it is hereby ORDERED that execution of the sentences imposed upon the defendants by the Circuit Court of Connecticut, Sixth Circuit, be and they hereby are stayed to a date thirty days following the issuance of the final decision of the Supreme Court of the United States upon the appeal to be taken by the defendants to such Court from the decision of the Supreme Court of Errors of the State of Connecticut issued on May 12, 1964.

At Hartford, Connecticut, this 20th day of May, 1964.

/s/ JOHN H. KING

Chief Justice of the
State of Connecticut

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JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1964

No. 496

ESTELLE T. GRISWOLD

AND

C. LEE BUXTON,

Appellants,

vs.

STATE OF CONNECTICUT

Appellee.

**ON APPEAL FROM THE SUPREME COURT
OF ERRORS OF CONNECTICUT**

MOTION TO DISMISS APPEAL

JOSEPH B. CLARK,
Ass't Prosecuting Attorney,
6th Circuit Court,
171 Church Street,
New Haven, Connecticut,
Attorney for Appellee.

PHILIP F. MANCINI, JR.,
Prosecuting Attorney,
6th Circuit Court,
171 Church Street,
New Haven, Connecticut,
Of Counsel

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**In the
Supreme Court of the United States**

OCTOBER TERM, 1964

No. 496

ESTELLE T. GRISWOLD

AND

C. LEE BUXTON,
Appellants,

vs.

STATE OF CONNECTICUT
Appellee.

**ON APPEAL FROM THE SUPREME COURT
OF ERRORS OF CONNECTICUT**

MOTION TO DISMISS

Appellee in the above-entitled case moves to dismiss on the grounds that the questions presented do not present a substantial federal question, that the judgment rests on an adequate non-federal basis, and that some of the federal questions sought to be reviewed were not timely or properly raised, or expressly passed on.

OPINIONS BELOW

The opinion of the Supreme Court of Errors of Connecticut rendered May 12, 1964, is reported in 25 Conn. L.J. #47, p. 5, 200 A. 2d 479 and is printed in the Appendix to the Jurisdictional Statement filed by the appellants, p. 21.

The opinion of the Appellate Division of the Circuit Court of Connecticut rendered January 7, 1963 is reported in 3 Conn. Cir. 6. It will also be found in A-427 Conn. Sup. Ct. Rec. & Briefs, 577 and is set forth in the Appendix to this statement.

JURISDICTION

On November 10, 1961 a warrant was issued charging that the appellant C. Lee Buxton, a duly qualified and licensed physician and appellant Estelle T. Griswold "in violation of the provisions of Sections 53-32 and 54-196 of the General Statutes of Connecticut, did assist, abet, counsel, cause and command certain married women to use a drug, medicinal article and instrument, for the purpose of preventing conception." The appellants were arrested on the same date and on November 24, 1961 the appellants demurred to the informations on the grounds that as the cited statutes would be applied to the appellants they would be unconstitutional in that they would deny the appellants' rights to liberty and property without due process of law in violation of the 14th Amendment to the Constitution of the United States and that they would deny them their rights to freedom of speech and communication of ideas under the 1st and 14th Amendments to the Constitution of the United States.

The demurrers were overruled. On January 2, 1962, the appellants, after trial to the Court, were found guilty and sentenced to pay a fine of \$100 each.

On January 10, 1962 after stipulation of the parties the Court entered an order for joint appeals.

Appellants filed an assignment of errors and an appeal was taken to the Appellate Division of the Circuit Court which affirmed the judgment of the Circuit Court, 6th Circuit in an opinion rendered January 7, 1963:

The Appellate Division certified two questions to the Supreme Court of Errors of Connecticut.

On January 31, 1963 appellants petitioned for certification of additional question which was granted on February 19, 1963. On April 28, 1964, the Supreme Court of Errors affirmed the judgment of the Circuit Court. Execution was ordered stayed on May 20, 1964 and on July 22, 1964 a motion of Appeal to the Supreme Court of the United States was filed with the Supreme Court of Errors of Connecticut.

QUESTIONS PRESENTED BY THE APPELLANTS IN THEIR JURISDICTIONAL STATEMENT.

1. Whether Section 53-32 and 54-196 deprive these appellants of their liberty and property without due process of law in violation of the 14th Amendment to the Constitution of the United States.

(a) As to the appellant Estelle T. Griswold. This issue should be dismissed as the issue was not expressly passed on (Rule 16b) since although she claimed this question in her demurrer and on her assignments of error, she did not brief the point in her brief before the Supreme Court of Errors of Connecticut. The Connecticut practice is: "The claims of error not briefed are considered to have been abandoned." *Leo Foundation v. Cabelus*, Conn., 201 A. 2d 654, 655 (1964).

(b) As to the appellant Estelle T. Griswold and the appellant C. Lee Buxton. Jurisdiction of the Supreme Court has been claimed on the basis of 28 U.S.C. Section 1257(2). Yet the appellants never argued, either in their demurrers nor did they claim as error in their assignments of errors that the statute itself

was repugnant to the United States Constitution. What the appellants did claim was that the statutes in question as they would be applied to them was a denial of their rights under the Constitution of the United States. In other words, they have argued that their federal rights prevented the application of these state statutes to them. The decisions of the Connecticut Courts adverse to this claim amounts to a denial of their assertion of federal rights rather than a validation of the state statutes and review can be had in the Supreme Court only via certiorari under 28 U.S.C. 1257 (3). *Mergenthaler Linotype Co. v. Davis*, 251 U.S. 256, 259 (1919).

2. Whether Section 53-32 in connection with Section 54-196 of the General Statutes of Connecticut deprives appellants' patients of their liberty without due process of law contrary to the 14th Amendment to the Constitution of the United States.

This issue should be dismissed as the question was not timely raised or expressly passed on (Rule 16b) in that this is the first time that the appellants are raising rights of others. The appellants in their claims of error below and in their brief before the Supreme Court of Errors of Connecticut, it is supposed, to avoid the ruling of *Tileston v. Ullman*, 318 U.S. 44, 46, 87 L. Ed. 603, 604, (1942) that a physician could not litigate the rights of patients not parties to the action, put great emphasis on the proposition even to the point of putting it in italics that the issue was "a denial of defendants' rights and not that of the patients. Brief of Defendants. — Appellants (page 59) A-427 Connecticut Records and Briefs, 615. Also the appellants in their Jurisdictional statement, p. 12, state that they are asserting rights personal to them. Manifestly since this has been the issue argued by them and considered

by the courts, they cannot now be permitted to change their grounds of appeal.

3. Whether Section 53-32 and Section 54-196, Connecticut General Statutes, as applied in this case to the appellants deprive them of their freedom of speech. Jurisdiction of the Supreme Court has been claimed on the basis of 28 U.S.C. Section 1257 (2). Yet the appellants never argued, either in their demurrers nor did they claim as error in their assignments of error that the statutes themselves were repugnant to the United States Constitution. What the appellants did claim was that the statutes in question as they would be applied to them were a denial of their rights under the Constitution of the United States.

In other words, they have argued that their federal rights prevented the application of these state statutes to them. The decisions of the Connecticut Courts adverse to this claim amounts to a denial of their assertion of federal rights rather than a validation of the state statutes and review can be had in the Supreme Court only via certiorari under 28 U.S.C. 1257 (3). *Mergenthaler Linotype Co. v. Davis*, 251 U.S. 256, 259 (1919).

4. Whether Section 53-32 is unconstitutional on its face and as applied to married patients of these appellants and other married couples because it is an unjustifiable invasion of their privacy contrary to the Fourth, Ninth and Fourteenth Amendments of the Constitution of the United States.

This question should be dismissed as the question was not timely or properly raised or passed on (Rule 16b) in that this is the first time that this issue has entered the case. Only the constitutional issues raised in lower courts are before the Supreme Court on appeal. *Kelley v. Kraemer, Mich. & Mo.*, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161, 3 A.L.R. 441 (1948).

One who has raised but one federal question cannot argue another unconnected question not raised in any of the courts below and not necessarily arising on the record, though it discloses facts on which it might have been raised. *Dewey v. City of Des Moines*, 173 U.S. 193, 19 S. Ct. 379, 43 L. Ed 665 (1899).

QUESTIONS PRESENTED

Where the appellants served as director (Estelle T. Griswold) and medical director (C. Lee Buxton) of a center to which married women came to obtain contraceptives and instructions as to their use to prevent pregnancy and where such married women received such contraceptive articles and instructions (in some cases from the appellants themselves) did Section 53-32, General Statutes of Connecticut, Revision of 1958 in connection with Section 54-196 of said statutes: 1) deny the appellant C. Lee Buxton his rights to liberty and property in violation of the Fourteenth Amendment to the Constitution of the United States? 2) deny these appellants their rights to freedom of speech and communication of ideas under the First and Fourteenth Amendments to the Constitution of the United States?

STATUTES INVOLVED

The pertinent state statutes are set forth in the Jurisdictional Statement at page 4.

STATEMENT OF THE CASE

In November, 1961, the Planned Parenthood League of Connecticut occupied offices at 79 Trumbull Street in New Haven, Connecticut. For ten days during that month the league operated a planned parenthood center in the same building. The appellant Estelle T. Griswold is the salaried executive director of the league and served as acting director of the

center. The other appellant, C. Lee Buxton, a physician, who has specialized in the fields of gynecology and obstetrics, was the medical director of the center. The purpose of the center was to educate persons generally as to the means and methods of preventing conception. In addition patients were furnished with various contraceptive devices, drugs, or materials. A fee was collected from the patient. At the trial three married women from New Haven testified that they had visited the center, paid a fee, received certain contraceptive devices and materials and instructions and advice as to their use, and used these devices and materials as contraceptives in subsequent marital relations with their husbands.

ARGUMENT

POINT I

THE DECISION BELOW WAS BASED UPON THE EVIDENCE

There is no dispute about the facts of the case. At the trial, three married women from New Haven testified that they had visited the planned parenthood center of which the appellant Estelle T. Griswold was director and the appellant C. Lee Buxton was medical director, had received advice, instruction and certain contraceptive devices and materials from either or both of the appellants, paid a fee, and used these devices and materials as contraceptives in subsequent marital relations with their husbands. Upon these facts, and with the testimony of the appellants to the same effect, there is no doubt that, within the meaning of Section 54-196 of the General Statutes of Connecticut, the appellants did abet and counsel married women in commission of an offense under Section 53-32 of the General Statutes of the State of Connecticut.

The law of accessories is well settled in Connecticut.

Everyone is a party to an offense who either actually

commits the offense, or assists in the actual commission of the offense or of any act which forms a part thereof, or directly or indirectly counsels or procures any person to commit the offense or do any act forming a part thereof. Counseling or procuring the commission of the offense includes . . . the procuring of implements or other means which may have served in its commission, with intent that they shall so serve; and assisting knowingly and wilfully, the perpetration of the offense in those acts which have prepared for, facilitated, or consummated the offense.

State v. Scott, 80 Conn. 317, 323-324 (1907). The above is still the rule in Connecticut. *State v. Pundy*, 147 Conn. 7, 12, 156 A. 2d 193, 195 (1959).

POINT II

THERE IS NO CONFLICT OF DECISION

Of the few jurisdictions that have ruled on the constitutionality of contraceptive statutes all seem to be in agreement with the Connecticut Court that regulation of contraceptives is a legitimate exercise of the state's police power to regulate public morals.

34 Connecticut Bar Journal 315 (September, 1960). See *Commonwealth v. Allison*, 227 Mass. 57, 116 N. E. 265 (1917); *Commonwealth v. Gardner*, 300 Mass. 372, 15 N. E. 2d 222 (1938); *People v. Pennock*, 294 Mich. 587, 293 N. W. 759 (1940); *People v. Sanger*, 222 N. Y. 192, 118 N. E. 637 (1918); *State v. Arnold*, 217 Wisc. 340, 258 N. W. 843 (1935); *State v. Kohn*, 42 N. J. Super 578, 127 A. 2d 451 (1956); *Cavallier Vending Corp. v. State Bd. of Pharmacy*, 195 Va. 626, 79 S. E. 2d 636 (1954) appeal denied, 347 U. S. 995, 74 S. Ct. 871, 98 L. Ed. 1127 (1954); *Lanteen Laboratories, Inc. v. Clark*, 294 Ill. App. 81, 13 N. E. 2d 678

(1938). Also see 1 C. J. S. — *Abortion*, Section 44, page 341; 113 A.L.R. 970 and 12 Am. Jr. 2d — *Birth Control*, Section 4, page 370.

POINT III

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW

The present action presents the same fact situation as was before this Court in the case of *Commonwealth v. Gardner*, 300 Mass. 372, 15 N.E. 2d 222 (1938). In that case a physician and other officials of the North Shore Mothers' Health Office — a clinic where contraceptives were sold or given to patients after examination by a physician — were arrested and convicted of violating a Massachusetts statute which prevented the sale or gift of contraceptives. It is the content n of the appellee, the State of Connecticut, that the two Connecticut Statutes, 53-32, using a drug or instrument to prevent conception, and 54-196, assisting, abetting, counseling another to commit an offense, when taken together would bar the sale or gift of a device used for the purpose of preventing conception, thus bringing the case at bar directly under the rule established by the Court in the *Gardner* case, *supra*.

This Court dismissed the appeal from the Massachusetts Court for want of a substantial federal question. *Gardner v. Commonwealth*, 305 U. S. 559, 59 S. Ct. 90, 83 L. Ed. 353 (1938). It is submitted that the same should be done in the instant case.

It is argued by the appellant Buxton that his right to practice medicine is impaired. The state denies this. The appellee is of the opinion that the practice of medicine is directed to the treatment, cure, and prevention of disease. Nowhere in either the testimony, findings or claims of error is there any claim that the women who testified in this case were in other than

perfect health. The fact situation in this case is not the same as that involved in *Poe v. Ullman*, 367 U. S. 497, 6 L. Ed. 2d 989, 81 S. Ct. 1752 (1961). The issue here is the one which was referred to by Harlan, J. in *Poe v. Ullman*, supra, in a dissenting opinion: "If we had a case before us which required us to decide simply, and in the abstraction, whether the moral judgment implicit in the application of the present statute to married couples was a sound one, the very controversial nature of these questions would, I think, require us to hesitate long before concluding that the Constitution precluded Connecticut from choosing as it has among these various views (on the morality of the use of contraceptives)" *Poe v. Ullman*, 367 U. S. 497, 547, 6 L. Ed. 2d 989, 1021 - 1022, 81 S. Ct. 1752, 1779 (1961).

"Besides, there is no right to practice medicine which is not subordinate to the police power of the States." *Lambert v. Yellowley*, 272 U. S. 581, 596, 71 L. Ed. 422, 47 S. Ct. 210, 49 A.L.R. 575,, 583 (1926).

The appellants' claim of freedom of speech is without merit. It was not the speech of the appellants that caused their conviction. It was their actions. When they furnished contraceptive materials to women to be used as contraceptives and instructed the women as to their use to prevent pregnancy, then the appellants have, under Connecticut law, committed a crime and have no more right to justify their conduct as being protected by the constitutional freedom of speech than a man yelling fire in a crowded theater, or a person placing a wager.

As the Court below said: "The record is bare of any showing that the law imposes any restraints on the protected liberties and the guaranteed rights of the defendants; and the merely notional, metaphysical or moral constraints, to which its preventive force is directed, are not such" as to fall within constitutional pro-

hibitions." *State of Connecticut v. Griswold and Buxton*, 3 Conn. Cir. 6, 10. (This opinion is printed in the Appendix to this motion)

The arguments of the appellants in essence attack the desirability of this statute. It has been held that the Supreme Court may not decide the desirability of legislation in determining its constitutionality; the forum for correction of ill-considered legislation being a responsive legislature. *Daniel v. Family Sec. Life Ins. Co.*, 336 U. S. 220, 69 S. Ct. 550 (1949).

Connecticut has statutes restricting sexual relations to the married with their spouses (Gen. Stat. Conn., Rev. 1958, Section 53-218 Adultery and Section 53-219 Fornication). Certainly the Connecticut General Assembly could have written an exception into Section 53-32. Since it did not, we must conclude that such an exception would endanger the effectiveness of the statute. *Commonwealth v. Gardner*, supra, p. 375.

The appellants in their Petition p. 18 state that contraceptive devices may be obtained in Connecticut. There is no foundation in the record for this statement. In fact, the opposite is true. In their assignment of errors to both the Appellate Division of the Circuit Court (A - 427 Conn. Sup. Court Rec. & Briefs 576) and to the Supreme Court of Errors of Connecticut (A - 427 Conn. Sup. Court Rec. & Briefs 583) the appellants cited as error the sustaining of objections made by the State-appellee to a question posed on cross-examination: "Now in the course of your investigation, Detective Berg, did you ascertain whether these products were available anywhere else in the City of New Haven?" This is the only place in the records where availability of contraceptives is mentioned. The appellants have not claimed this ruling on evidence in their Notice of Appeal to this Court nor in Questions to be reviewed in their Jurisdictional Statement. Manifestly they cannot make that claim now.

The appellee submits that these appellants who were in the business of running a contraceptive dispensary to which women came, paid a fee, were given devices and instructions as to their use to prevent conception, and subsequently used these devices to prevent conception have been properly convicted of aiding and abetting the use of contraceptives.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this appeal be dismissed and that certiorari be denied.

Respectfully submitted,

JOSEPH B. CLARK
Counsel for Appellee

171 Church Street
New Haven, Connecticut
September 30th, 1964

CERTIFICATE OF SERVICE

I, Joseph B. Clark, counsel for appellee, and a member of the bar of the Supreme Court of the United States do hereby certify that on the thirtieth day of September, 1964, I served a copy of the foregoing Motion to Dismiss upon the appellants by mailing five copies thereof, postage prepaid to Fowler V. Harper, Esq., 127 Wall Street, New Haven Connecticut.

JOSEPH B. CLARK
Counsel for Appellee

APPENDIX

Appellate Division of the Circuit Court

ARGUED OCTOBER 19, 1962

STATE OF CONNECTICUT v. ESTELLE T. GRISWOLD

File No. CR 6-5653 AP

STATE OF CONNECTICUT v. C. LEE BUXTON

File No. CR 6-5654 AP

Date of Judgment January 7, 1963

Decision Announced January 17, 1963

Informations charging the defendants with the crime of assisting and abetting the use of drugs, medicinal articles and instruments for the purpose of preventing conception; brought to the Circuit Court in the sixth circuit and tried to the court, *Lacey, J.*; judgment of guilty in each case and appeal by the defendants. *No error; certified to the Supreme Court of Errors.*

Catherine C. Roraback, for the appellants, (defendants).

Julius Maretz, prosecuting attorney, and *Joseph B. Clark*, assistant prosecuting attorney, for the appellee (for the appellee (State)).

KOSICKI, J. Both of these cases were tried together and, by stipulation, the appeals from the judgments rendered have been combined. The informations contained identical allegations charging each defendant with a violation of §§ 53-32 and 54-196 of the General Statutes in that each defendant "did assist, abet, counsel, cause and command certain married women to use a drug, medicinal article and instrument; for the purpose of preventing conception . . . and that thereafter said married women in consequence of said conduct [of the defendant] did in fact use said drugs, medicinal articles, and instruments for

the purpose of preventing conception."¹ In each case a demurrer was filed on the ground that the quoted sections of the General Statutes were unconstitutional as here applied because (1) they denied the defendants their rights to liberty and property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States and (2) they denied them their rights to freedom of speech and communication of ideas under the First and Fourteenth Amendments to the Constitution of the United States and §§ 5 and 6 of Article First of the Constitution of Connecticut. Both demurrers were overruled and error is assigned in the ruling of the court.

The court found the following facts. The Planned Parenthood Center of New Haven, referred to herein as Center, was opened on November 1, 1961 to provide information, instruction and medical advice to married persons as to means and methods of preventing conception and to educate persons generally as to such means and methods. The Center was located in eight rooms on the second floor of a building at 79 Trumbull Street in New Haven, which consisted of a reception room, waiting room, interview room, consultation room, examining room, two dressing rooms and a laboratory. The Center operated from November 1 to November 10, when it was closed following the arrest of the defendants. The Planned Parenthood League occupied an office consisting of four rooms on the second floor of the same building. The defendant Estelle T. Griswold held the salaried office of executive director of the League. She was also the acting director of the Center and in charge of administration and the educational program.

The defendant C. Lee Buxton is a physician, licensed to practice in the state of Connecticut, who is a specialist in the field of obstetrics and gynecology, the director of the University Obstetrical and Gynecological Service at the Grace-New Haven

Community Hospital in New Haven, Connecticut, the chairman of the Department of Obstetrics and Gynecology and Professor of Obstetrics and Gynecology at the Yale University Medical School in New Haven, an author in the field of his specialty and a leader in its professional organizations. He was the medical director of the Center, both before its opening and while it was in operation from November 1 to November 10, 1961. As such medical director and after consultation with the Medical Advisory Committee of the Center, which committee was appointed by him, Doctor Buxton made all medical decisions as to the facilities of the Center, the arrangement of its rooms, the equipment purchased for it, the medical forms, patients' history forms and other forms used there, the procedures followed in processing the patients at the Center, the types of contraceptive advice available and provided at the Center, the types of contraceptive articles and materials available at the Center for distribution to patients, the methods of providing the same, and the selection, assignment and supervision of the medical doctors to staff the Center. In addition, Dr. Buxton on several occasions, as a physician, examined and gave contraceptive advice to patients at the Center while it was in operation from November 1 to November 10, 1961.

The general procedure for the processing of a patient of the Center was as follows: Individuals called the Center by telephone or came in making inquiry, and were briefly questioned to ascertain whether they were in fact seeking contraceptive advice and, if so, they were given an appointment for a stated day and hour. The patient, having come to the Center at the appointed time, was first interviewed by a staff member who took a case history of the patient on a standard form on which were entered the patient's name, her husband's name, ages of both, employment, family income, other economic information, the patient's pregnancy history, methods of contraception pre-

viously used, the reason for desiring a change of method, and the pertinent medical history of the patient, her husband and children. After this the patient attended a group orientation session with other patients at which all of the methods of contraception available at the Center were described, at the conclusion of which lecture the patient selected the method which she desired to use and as to which she wished to obtain further information and advice.

Thereafter each patient individually saw a staff doctor who gave her a pelvic examination, reviewed the method of contraception selected by the patient in the light of this examination and of her medical history, and prescribed to the patient the method selected by her unless it was contraindicated. The doctor or nurse then gave the patient advice as to how to use the method of contraception prescribed, and advised her when to return to the Center for further consultation and advice.

The patient was then furnished with the contraceptive device, drug or contraceptive material prescribed by the doctor, made an appointment for a return visit, was charged a fee for the visit and left. The fees charged to the patients were on a sliding scale ranging from nothing to a maximum of \$15.00 and the exact fee charged any one patient was determined on the basis of family income. In the waiting room and available to patients were various pamphlets some of which contained information, instruction and advice on the various methods of contraception available.

Joan B. Forsberg, a housewife and mother of three children living with her family in New Haven, upon learning of the existence of the Center, arranged for an appointment at the Center which was made for November 8, 1961 and on that date she went to the Center as a patient, seeking contraceptive advice,

where she had her case history taken by a receptionist, attended an orientation session at which the defendant Estelle T. Griswold instructed her and other women as to the various methods of contraception available at the Center and told the patients they could choose the method they would individually prefer and be furnished with the necessary materials if the doctor approved, was given a pelvic examination by a staff doctor, was told by the staff doctor that the anti-ovulation pill method of contraception which she had chosen was all right for her to use, was instructed by the doctor in its use, was thereafter given a supply of sixty anti-ovulation pills by the person on duty at the registration desk at the direction of the defendant Estelle T. Griswold, and before leaving paid a fee to the Center and was told to return to the Center in two months. After her visit to the Center, Mrs. Forsberg used approximately thirty of the pills furnished to her at the Center for the purpose of preventing conception.

On November 7, 1961, one Marie Wilson Tindall, a housewife and mother of several children living with her family in New Haven, after having made an appointment beforehand, went to the Center with her husband in order to obtain information concerning contraception. She had her case history taken by the receptionist, attended an orientation session with other patients at which were described the various types of contraceptives available at the Center, was given a pelvic examination by a staff doctor, told the doctor that she had chosen a diaphragm as the type of contraceptive she wished to use, was fitted and given by doctor a diaphragm and accompanying articles and thereafter was instructed by one of the personnel in how to use them, and before leaving paid a fee of \$7.50 to the Center. After her visit to the Center, Mrs. Tindall used the diaphragm and other articles furnished to her at the Center for the purpose of preventing conception.

On November 9, 1961, one Rosemary Anne Stevens, a young student married nearly a year and living with her husband in New Haven, having made an appointment, went to the Center seeking to obtain contraceptive advice additional to that previously obtained by her in England. While at the Center she had her case history taken by the defendant Estelle T. Griswold, attended an orientation session at which the defendant Estelle T. Griswold described the methods of contraception available at the Center, was given a pelvic examination by the defendant Dr. C. Lee Buxton acting as a staff doctor on that day at the Center, was advised by him that the method of contraception which she had been using and had chosen was satisfactory for her, was given instruction by him as to its use, and, before leaving the Center was given a tube of contraceptive jelly by the defendant Estelle T. Griswold and paid a fee of \$15.00 to the Center. After her visit to the Center, the said Mrs. Stevens used this jelly for the purpose of preventing conception.

The defendant C. Lee Buxton served as medical director of the Center and furnished, at the Center, medical advice to married women as to the use of drugs, contraceptive articles and materials and instruments for the purpose of preventing conception because in his judgment, based on the overwhelming opinion of medical experts in this country, this type of advice is an aspect of medical care which it is the responsibility of every doctor to furnish when in his opinion the patient should have it, and he therefore felt justified as a medical doctor in giving such advice and instruction.

It is the opinion of doctors who practice and specialize in the practice of obstetrics and gynecology in the city of New Haven and in the state of Connecticut, that it is accepted medical practice for a physician to advise a woman suffering from a serious medical condition such as hypertensive cardiovascular heart disease that pregnancy would be detrimental to her health

and that she should avoid such pregnancy. Mrs. Griswold served as administrative director of the Center and participated in its operation because she felt that medically prescribed methods of contraception should be made available to the married women of Connecticut in order that they might protect their health as mothers, the emotional and economic stability of their families and promote responsible parenthood.

The issues of constitutionality of § 53-32, raised by demurrer, and urged in the trial and on appeal are fundamentally not new. The statute had been declared as not violative of the Fourteenth Amendment by our Supreme Court of Errors in a number of cases presenting a variety of factual situations, including those described in the foregoing recital. In those cases were involved alleged violations of the same constitutional rights that are the subject of main concern in this appeal. *Buxton v. Ullman* (and companion cases), 147 Conn. 48, 156 A. 2d 508, 367 U.S. 497, 6 L. Ed. 2d 989, (appeals dismissed for absence of justiciable controversy); *Trubek v. Ullman*, 147 Conn. 633, 165 A. 2d 158, 367 U.S. 907, 6 L. Ed. 2d 1249, (appeal dismissed, certiorari denied); *Tileston v. Ullman*, 129 Conn. 84, 26 A. 2d 582; 318 U.S. 44, 87 L. Ed. 603, (appeal dismissed "no standing"); *State v. Nelson*, 126 Conn. 412, 11 A. 2d 856. It has been repeatedly stated that § 53-32 is a valid exercise of the police power of the state; that no exceptions could be injected into the statute to allow physicians to advise and prescribe the use of contraceptive devices for use by married women; that such use was not permissible even in situations where, in the opinion of a competent physician the "general" health and well-being of the patient required it or pregnancy posed a real and immediate threat to the life and health of the patient. See *Buxton v. Ullman*, supra, 51-54, 55, and cases cited; *Trubek v. Ullman*, supra, 655.

The chief contention of the defendants, relating to their con-

viction as accessories, is that (1) § 53-32 could not be applied constitutionally to penalize the actions of the three married women, as described above; therefore, (2) there were no substantive offenses committed by them to which the defendants could have been accessories. It is unquestionably the law that an offense must have been committed before a person can be charged as accessory to its commission, *State v. Wakefield*, 88 Conn. 164, 175. That does not mean that the principal offender must have been first convicted or even prosecuted. The test is whether one charged as an accessory shared in the unlawful purpose and knowingly and wilfully assisted the perpetrator in the acts which prepared for, facilitated or consummated the offense. *State v. Pundy*, 147 Conn. 7, 11.

Much of the defendants' brief dealing with the commission of the substantive offense, is directed toward an attack on the constitutionality of the statute because of its invasion of the freedom of conjugal felicity which married couples, by the natural order of society, are entitled to enjoy. It is stated that enforcement of the statute would result in an invasion of privacy, a violation of the sanctities of the home and a gross intrusion into the most sacred area of life. These rights and freedoms are protected both by our federal and state constitutions and there is no suggestion in the record or in the evidence that they have been invaded. They are the rights guaranteed to the married persons involved and not the rights of these defendants. *Tilston v. Ullman*, 318 U.S. 44, 46, 87 L. Ed. 603, 604.

The necessary proof of the offense was supplied by the voluntary testimony of the three married women. This evidence was not coerced nor was it illegally or surreptitiously obtained. It was also found indisputably that the defendants performed the various acts described above in assisting, abetting and counseling the use of contraceptives by each of these women and that

the contraceptive devices and materials were so used. That was the acknowledged purpose of the clinic in the operation of which the defendants admittedly participated. There was no error in overruling the demurrers and the conclusion of the court that the defendants were guilty under the cited statutes must stand.

The next main contention of deprivation of constitutional rights relates to the claim of the defendant Dr. Buxton that in giving advice he did he was conscientiously discharging his duties as a competent physician and a recognized authority in the field of obstetrics and gynecology; and depriving him of this right is a denial of his constitutional guarantee to freedom of speech in violation of the First and Fourteenth amendments to the Constitution of the United States and Article First, §§ 5 and 6, of the Constitution of Connecticut. This claim had not been expressly asserted in the earlier cases cited above; we are not warranted in concluding, however, that this omission was due to oversight on the part of court and counsel or a knowing fragmentation of constitutional issues to be reserved for later presentation. The rule in *Buxton v. Ullman*, 147 Conn. 48, 51-55, appears to be inclusive of the claim now being separately presented as a curtailment of freedom of speech, that is particularly so because there can be no practical separation of facts to divide the acts of prescribing and furnishing the contraceptive materials and the words and speech accompanying such acts. Both were part of the practice of medicine which, to the extent inhibited by the statute in question, must yield to the police power of the state. *State v. Nelson*, 126 Conn. 412, 422.

In view of the decisions of our Supreme Court of Errors, which we must consider as controlling, we regard the remaining arguments addressed to the alleged unconstitutional aspects of § 53-32, as a recapitulation of what our courts have already considered and what, without exception, has been declared to

be matter for legislative rather than judicial consideration. Our examination of the records and briefs in the former cases confirms our belief that not only the same or nearly identical claims of law but also substantially similar comments and opinions, liberally quoted from medical and religious sources, had been urged upon our courts and the answer has been the same. See *State v. Nelson*, supra, Conn. Supreme Court Rec. & Briefs, A - 144; *Tileston v. Ullman*, supra, Conn. Sup. Ct. Rec. & Briefs, A - 172; *Buxton v. Ullman*, supra, Conn. Sup. Ct. Rec. & Briefs, A - 380; *Trubek v. Ullman*, supra, Conn. Sup. Ct. Rec. & Briefs, A - 391.

Every general law, in its ultimate objective, is declaratory of public policy. The wisdom or unwisdom of legislation is not subject to judicial examination unless it so interferes with rights of individuals as to require judicial intervention for their protection. The possibility or present predictability of failure in the legitimate aims of a legislative enactment, or even a pre-visive estimate of futility in the attempt, does not pose a question for judicial determination. *State v. McKee*, 73 Conn. 18, 30. A law, to be held unconstitutional, must be plainly violative of some constitutional mandate and admit of no other reasonable construction. "Whatever may be our own opinion regarding the general subject, it is not for us to say that the legislature might not reasonably hold that the artificial limitation of even legitimate child-bearing would be inimical to the public welfare and, as well, that the use of contraceptives, and assistance therein or tending thereto, would be injurious to public morals . . . *State v. Nelson*, supra, 424.

It is not alone for the preservation of morality in the religious sense that the legislature may have been impelled to act, but also for the perpetuation of race and to avert those perils of extinction of which states and nations have been alertly aware since

the beginning of recorded history. Each civilized society has a primordial right to its continued existence and to the discouragement of practices that tend to negate its survival.

The record is bare of any showing that the law imposes any restraints on the protected liberties and the guaranteed rights of the defendants; and the merely notional, metaphysical or moral constraints, to which its preventive force is directed, are not such as to fall within constitutional prohibitions

The remaining assignments of error are directed toward rulings excluding certain proffered evidence and the denial of one paragraph of the motion to correct the finding. What has been said above and the decisions referred to herein support the correctness of the court's rulings.

The questions involved are deemed to be of great public importance and it is found that there are substantial questions of law which should be reviewed by the Supreme Court of Errors, namely:

1. Have the defendants been denied their rights to liberty and property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States?

2. Have the defendants been denied their rights to freedom of speech and communication of ideas under the First and Fourteenth Amendments to the Constitution of the United States and Sections 5 and 6 of Article first of the Constitution of Connecticut?

There is no error; the case is certified to the Supreme Court of Errors.

In this opinion PRUYN and DEARINGTON, Js. concurred.

Footnote

¹ "Sec. 53-32. USE OF DRUGS OR INSTRUMENTS TO PREVENT CONCEPTION. Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned."

² "Sec. 54-196. ACCESSORIES. Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender."

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In the
Supreme Court of the United States

OCTOBER TERM, 1964

No. 496

ESTELLE T. GRISWOLD

AND

C. LEE BUXTON,
Appellants,

vs.

STATE OF CONNECTICUT,
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF ERRORS OF CONNECTICUT

REPLY TO MOTION TO DISMISS

FOWLER V. HARPER,
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**In the
Supreme Court of the United States**

OCTOBER TERM, 1964

No. 496

ESTELLE T. GRISWOLD

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Appellants,

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STATE OF CONNECTICUT,

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**ON APPEAL FROM THE SUPREME COURT
OF ERRORS OF CONNECTICUT**

REPLY TO MOTION TO DISMISS

This response to appellee's Motion to Dismiss is directed only to that part of the Motion under the heading, Questions Presented by the Appellants in their Jurisdictional Statement. (pp. 3-6)

I.

In sub-head 1(a) (p. 3), appellee declares that the issue whether Connecticut Statutes 53-32 and 54-196 deprived appellant Griswold of her liberty and property without due process of law, although claimed in her demurrer and in her assignment of errors, was not argued in her brief before the Supreme Court of Errors and, under Connecticut law, was regarded as abandoned. This statement is erroneous. The fact is that the issue was briefed. (Appellants' Brief, p. 35). The same factual error is present in sub-head 2 (p. 4) and sub-head 4 (p. 5) of appellee's Motion to Dismiss. Both issues were covered in appellants' brief to the Supreme Court of Errors. (Brief, pp. 14, 15 ff. and p. 18).

II.

In sub-head 1 (b) (pp. 3-4), the argument is made that appellants did not claim that Connecticut Statutes 53-32 and 54-196 were repugnant to the Constitution of the United States. Appellee claims that appellants' contention was merely that the statutes in question, as they would be applied to them, was a denial of their rights under the Constitution of the United States and that "their federal rights prevented the application of these state statutes to them." The same argument is made in sub-head 3 (p. 5).

Any fair interpretation of appellants' demurrer, assignment of errors and argument clearly means that the constitutionality of the Connecticut Statutes was challenged as depriving appellants of liberty and property under the Fourth, Ninth and Fourteenth Amendments and of freedom of speech under the

¹ Appellants' brief below is available in "Connecticut Supreme Court Records and Briefs," Nov. Term 1963, 560 ff. with original pagination, cited above.

First and Fourteenth Amendments The Connecticut Statutes were claimed to be unconstitutional under these amendments as applied to appellants.

III.

The complete and convincing answer to appellee's arguments, above, is to be found in the opinions of the two Connecticut Appellate Courts, both of which treated all the issues set forth in appellants' Jurisdictional Statement as before them and as adjudicated by them. Thus the opinion of the Appellant Division of the Circuit Court declared, "in each case a demurrer was filed on the ground that the quoted sections of the General Statutes were unconstitutional as here applied because (1) they denied the defendants their rights to liberty and property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States and (2) they denied them their rights to freedom of speech and communication of ideas under the First and Fourteenth Amendments to the Constitution of the United States and §§ 5 and 6 of Article First of the Constitution of Connecticut. Both demurrers were overruled and error is assigned in the ruling of the court." (Appellants' Jurisdictional Statement, p. 29.)

So too, the Brief opinion of the Supreme Court of Errors interpreted the issues as involving the validity of the Connecticut Statutes under the federal constitution. After referring to the decision of the Appellant Division, it went on to state that that court had certified certain substantial questions of law to be reviewed. "These questions together with others certified by us are now before us on this appeal." (Jurisdictional Statement, p. 22.) The opinion then referred to *State vs. Nelson*, 126 Conn. 412, 11 A.2d 856; *Tileston vs. Ullman*, 129 Conn. 84, 26 A.2d 582; *Buxton vs. Ullman*, 147 Conn. 48, 156 A.2d

508; *Trubek vs. Ullman*, 147 Conn. 633, 165 A.2d 158. It then went on: "An examination of these cases discloses that every attack now made on the statute, standing by itself or when considered in combination with § 54-196, has been made and rejected in one or more of these cases, the last two having been decided within the past five years".

It could not possibly be maintained that the above cited cases did not decide issues of constitutional validity. Following them, the Supreme Court of Errors in these cases declared that "the legislature is primarily the judge of the regulations required to that end [to conserve the public safety and welfare, including health and morals] and its police statutes may be declared unconstitutional only when they are arbitrary or unreasonable attempts to exercise its authority in the public interest. The court again cited the *Nelson* and *Buxton* cases and authorities therein. (Jurisdictional Statement, p. 23.)

Respectfully submitted,
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New Haven, Connecticut,
Attorney for Appellants.

5

APPENDIX

**THE SUPREME COURT OF ERRORS
OF THE
STATE OF CONNECTICUT**

STATE OF CONNECTICUT
vs.
ESTELLE T. GRISWOLD
AND C. LEE BUXTON

Circuit Court of Connecticut,
Appellate Division
File Numbers CR 6-5653 AP
CR 6-5654 AP

PETITION FOR CERTIFICATION BY SUPREME COURT OF ERRORS

Appellate Panel:

KOSICKI, J.
PRUYN, J.
DEARINGTON, J.

**To the HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF
THE SUPREME COURT OF ERRORS:**

... 4. In failing to find that the application of Sections 53-32 and 54-196 of the General Statutes to the actions of these defendants violated their rights to freedom of speech and to life, liberty and property without due process of law, in violation of the provisions of the Constitutions of the United States and the State of Connecticut?

[Record, Supreme Court of Errors, pp. 42, 44]

Nos. CR6-5653 AP
CR6-5654 AP
STATE OF CONNECTICUT
vs.
ESTELLE T GRISWOLD
AND C. LEE BUXTON

Supreme Court of Errors,

February 19, 1963

ORDER GRANTING CERTIFICATION

The defendants have filed a petition for certification and the court having considered said petition finds that it should be granted.

Whereupon it is ordered that said petition be and it hereby is granted.

By the Court,

RAYMOND G. CALNEN, Clerk

[*Ibid* pp. 49, 50]

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In the
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OCTOBER TERM, 1964

No. 496

ESTELLE T. GRISWOLD

AND

C. LEE BUXTON,

Appellants,

v.

CONNECTICUT.

Appeal From The Supreme Court Of Errors Of
Connecticut

BRIEF FOR APPELLANTS

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In the
Supreme Court of the United States

OCTOBER TERM, 1964

No. 496

ESTELLE T. GRISWOLD

AND

C. LEE BUXTON,

Appellants,

v.

CONNECTICUT.

**Appeal From The Supreme Court Of Errors Of
Connecticut**

BRIEF FOR APPELLANTS

OPINION BELOW

The opinion of the Supreme Court of Errors of Connecticut is reported in 151 Conn. 544, 200 A.2d 479. It is reprinted in the record at pages 61-63.

¹ The authors of this brief wish to record their great and obvious debt to Professor Fowler V. Harper who worked on this matter up to the time of his death on January 8, 1965.

JURISDICTION

On November 19, 1961, appellants Estelle T. Griswold and C. Lee Buxton were arrested on informations filed by the Prosecuting Attorney for the Circuit Court of Connecticut, Sixth Circuit, alleging violations of Sections 53-32 and 54-196 of the General Statutes of Connecticut (R. 1, 7). Appellants filed demurrers on the grounds, *inter alia*, that said statutes were unconstitutional as being a denial of due process of law under the Fourteenth Amendment, and a denial of freedom of speech under the First and Fourteenth Amendments, of the Constitution of the United States (R. 2, 8). On December 20, 1961, the demurrers were overruled on both grounds (R. 3-6, 9-12).

Appellants were tried before the Circuit Court without a jury, found guilty and, on January 2, 1962, sentenced to pay fines of \$100 each (R. 13-4). Appeals were taken from the judgments and, on order of the Circuit Court, the appeals were combined (R. 15). A statement of findings of fact, conclusions and rulings was made by the Circuit Court on June 12, 1962 (R. 16-30, 32-3).

Appellants filed an assignment of errors which, *inter alia*, again challenged the constitutionality of the Connecticut statutes on the grounds set forth above (R. 33-7). On January 7, 1963, the Appellate Division affirmed the convictions (R. 40-50).

The Appellate Division certified to the Supreme Court of Errors the two questions raised by the demurrers as to the constitutionality of the statutes (R. 49-50). The Supreme Court of Errors granted the petition of appellants to certify additional questions (R. 52-60). Thereafter, on April 28, 1964, the Supreme Court of Errors affirmed the judgment of the Appellate Division, holding that the Connecticut statutes under at-

tack were not in conflict with the United States Constitution (R. 61-5). Stay of execution was ordered on May 20, 1964 (not printed in record).

Notice of appeal to the Supreme Court of the United States was filed with the Supreme Court of Errors of Connecticut on July 22, 1964 (R. 65-6). On December 7, 1964, this Court noted probable jurisdiction (R. 67).

This Court has jurisdiction under 28 U.S.C. 1257 (2). *Dahnke-Walker Milling Co. vs. Bondurant*, 257 U.S. 282 (1921).

STATUTES INVOLVED

The statutes involved in this case are Sections 53-32 and 54-196, General Statutes of Connecticut, Revision of 1958.

Section 53-32 provides:

"Use of drugs or instruments to prevent conception. Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned."

Section 54-196 provides:

"Accessories. Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender."

QUESTIONS PRESENTED

1. Whether Sections 53-32 and 54-196 of the General Statutes of Connecticut, on their face or as applied in this case, deprive these appellants of liberty or property without due

process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

2. Whether Sections 53-32 and 54-196 of the General Statutes of Connecticut, on their face or as applied in this case, deprive these appellants of their rights to freedom of speech in violation of the First and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE

Appellant C. Lee Buxton is a physician, licensed to practice in the State of Connecticut and Chairman of the Department of Obstetrics and Gynecology at the Yale Medical School (R. 17). He is an author in the field of his specialty and a leader in professional organizations concerned with that field (R. 17).

Appellant Estelle T. Griswold is Executive Director of the Planned Parenthood League of Connecticut (R. 17).

On November 1, 1961, following the decision of this Court in *Poe vs. Ullman*, 367 U.S. 497 (1961), the Planned Parenthood Center of New Haven was opened (R. 16-7). The purpose of the Center was to provide information, instruction and medical advice to married persons as to the means of preventing conception, and to educate married persons generally as to such means (R. 17).

The Center occupied eight rooms of the building in which it was situated (R. 17). Dr. Buxton was Medical Director of the Center (R. 17). Mrs. Griswold was Acting Director of the Center in charge of its administration and its educational program (R. 17).

During the period of its operation, from November 1 to November 10, the Center made information, instruction, edu-

cation and medical advice on birth control available to married persons who sought it (R. 17).

With respect to a woman who came to the Center seeking contraceptive advice the general procedure was to take her case history and explain to her various methods of contraception. She was then examined by a staff doctor, who prescribed the method of contraception selected by her unless it was contraindicated. The patient was furnished with the contraceptive device or material prescribed by the doctor, and a doctor or nurse advised her how to use it. Fees were charged on a sliding scale, depending on family income, and ranged from nothing to \$15. (R. 18-9).

Dr. Buxton, as Medical Director, made all medical decisions with respect to the facilities of the Center, the procedure to be followed, the types of contraceptive advice and methods available, and the selection of doctors to staff the Center (R. 18). In addition, on several occasions, as a physician he examined and gave contraceptive advice to patients at the Center (R. 18). Mrs. Griswold on several occasions interviewed persons coming to the Center, took case histories, conducted group orientation sessions describing the methods of contraception and, on one occasion, gave a patient a drug or medical article to prevent conception (R. 20).

Among those who went to the Center seeking contraceptive advice were three married women. They followed the procedure described above, were given contraceptive material prescribed by the doctor, and subsequently used the material for the purpose of preventing conception. (R. 20-2).

On November 10, 1961, after Dr. Buxton and Mrs. Griswold were arrested, the Center closed (R. 18).

The Prior Litigation And The State Court's Interpretation Of Sections 53-32 And 54-196.

The Connecticut Supreme Court of Errors has passed upon the interpretation and validity of Sections 53-32 and 54-196 on four occasions prior to its decision in the case at bar:

In *State vs. Nelson*, 126 Conn. 412, 11 A.2d 856, decided in 1940, two physicians and a nurse were charged with assisting, abetting and counseling a married woman to use contraceptive devices under conditions where, in the opinion of the physician, "preservation of the general health" of the patient required such use to prevent conception. A demurrer to the information was sustained by the trial court on due process grounds. The Supreme Court of Errors, in a three to two decision, reversed the lower court and upheld the validity of the statutes. The Court construed the statutes as applying in all circumstances, regardless of health factors, but expressly did not decide whether an implied exception would be recognized where "pregnancy would jeopardize life" (126 Conn. at 418, 11 A.2d at 859).

The *Nelson* case involved the operation of a birth control clinic in Waterbury. At that time nine such clinics were functioning in Connecticut. Following the *Nelson* decision all the clinics in the State closed down. On remand to the trial court the *Nelson* prosecution was nolléd.²

Shortly afterwards, Dr. Wilder Tileston, another Connecticut physician, brought a declaratory judgment action to determine

² See 367 U.S. at 532. At the same time as it decided the *Nelson* case the Supreme Court of Errors, in a companion case, ruled that the Connecticut search and seizure laws did not authorize the seizure and destruction of the contraceptive materials in possession of the Waterbury clinic. *State vs. Certain Contraceptive Materials*, 126 Conn. 428, 11 A.2d 863 (1940).

whether Sections 53-32 and 54-196 made it unlawful for him to prescribe the use of contraceptive devices for married women, living with their husbands, in cases where in his professional judgment a pregnancy might result in death or serious injury to health. In *Tileston vs. Ullman*, 129 Conn. 84, 26 A.2d 582 (1942), the Supreme Court of Errors, again by a three to two vote, ruled that the statutes were to be construed as an absolute prohibition and permitted no exception under any circumstances. In the opinion of the majority the Legislature "was entitled to believe" that the alternative available to the women, namely, abstinence from marital relations, "was reasonable and practical" (129 Conn. at 93, 26 A.2d at 587). The majority again sustained the statutes against the due process challenge. On appeal, this Court dismissed the case, without reaching the merits, on the ground that Dr. Tileston did not have standing to raise the constitutional rights of his patients. *Tileston vs. Ullman*, 318 U.S. 44 (1943).

The issues were raised again some years later in a group of declaratory judgment suits. Dr. C. Lee Buxton, appellant here, brought one of these suits, asserting his own rights to liberty and property in the practice of his profession and urging that such rights were infringed by legislation which prevented him from prescribing, in accordance with accepted medical practice, contraceptive devices to three married women who were plaintiffs in the other suits. In the case of one such plaintiff, a further pregnancy "would be exceedingly dangerous to her life." *Buxton vs. Ullman*, 147 Conn. 48, 52, 156 A.2d 508, 511 (1959). In another case a married couple had had three abnormal children, no one of whom lived more than ten weeks, the cause of these abnormalities was thought by the physicians to be genetic, and the prospect of another pregnancy was "extremely disturbing" to the couple (147 Conn. at 53, 156 A.2d at 511). In a further case, a married couple had

had four children, none of whom had lived, and because of blood factor incompatibilities of the plaintiffs "the prospects that they can procreate a normal child is (*sic*) highly unlikely" (*ibid*). All the plaintiffs based their claims on due process. Demurrers to the complaints were sustained and the Supreme Court of Errors, this time unanimously, affirmed, considering the issues foreclosed by the prior decisions. On appeal, a majority of this Court held that the "fact that Connecticut has not chosen to press the enforcement of this statute deprives these controversies of the immediacy which is an indispensable condition of constitutional adjudication." *Poe vs. Ullman*, 367 U.S. 497, 508 (1961).

In the fourth case a young married couple brought a declaratory judgment action on the ground that the Connecticut statutes would deprive them of their rights, under the due process clause, to obtain medical advice on proper methods of contraception, "thereby avoiding the possibility that children will be conceived before these plaintiffs are prepared psychologically or economically for the duties and obligations of parenthood." *Trubek vs. Ullman*, 147 Conn. 633, 165 A.2d 158 (1960). The Supreme Court of Errors, holding that the issues were concluded by previous decisions, affirmed the trial court's dismissal of the action. Appeal was dismissed and petition for certiorari denied by this Court. *Trubek vs. Ullman*, 367 U.S. 907 (1961).

As a result of these four decisions, together with the one rendered in the case at bar, it is clear that the Supreme Court of Errors has interpreted Sections 53-32 and 54-196 to mean that a physician is prohibited from advising or prescribing, and all persons are prohibited from using, contraceptive devices, regardless of whether:

- (1) The persons involved are married and living together.

(2) The devices are prescribed by a licensed physician in accordance with "generally accepted medical practice" (126 Conn. at 419, 11 A.2d at 859).

(3) Contraceptive measures are "necessary to protect and procure the best possible state of health and well being" (126 Conn. at 415, 11 A.2d at 858).

(4) Pregnancy will seriously jeopardize life or health or result in defective or abnormal children or in still-births.

It is also clear, however, that Sections 53-32 and 54-196 do not prohibit the sale or use of contraceptive devices in Connecticut for the prevention of disease, as distinct from the prevention of conception. The Supreme Court of Errors has not directly ruled on this question. But the conclusion is apparent from the following considerations:

(1) Section 53-32 applies only to the use of contraceptive devices "for the purpose of preventing conception." It contains no reference to their use for other purposes, including the well-known practice of selling and using such devices for the prevention of disease.

(2) The Supreme Court of Errors has consistently cited with approval and relied upon the decisions of the Massachusetts Supreme Judicial Court interpreting the Massachusetts anti-contraceptive law (126 Conn. at 419, 421-2, 425, 11 A.2d at 859, 860, 862; 129 Conn. at 88, 89-91, 26 A.2d at 585, 585-6). That law does not forbid the use of contraceptive devices, but its prohibition does extend to any person who "sells, lends, gives away, exhibits, or offers to sell, lend or give away . . . any drug, medicine, instrument or article whatever for the prevention of conception." Mass. G.L. (Ter. ed.) Chap. 272, § 21. In *State vs. Nelson* the Connecticut Supreme Court of Errors grouped the Massachusetts and Connecticut statutes in the same category of state anti-contraceptive laws, as ones that

"attempt complete suppression" (126 Conn. at 420, 11 A.2d at 860). And in *Tileston vs. Ullman* it referred to the Massachusetts statute as a "similar statutory prohibition" (129 Conn. at 89, 26 A.2d at 585). In *Commonwealth vs. Corbett*, 307 Mass. 7, 29 N.E. 2d 151 (1940), it was held that the Massachusetts statute did not prevent the sale of contraceptive devices for the prevention of disease. And in *Tileston* the Connecticut Supreme Court of Errors expressly noted this interpretation and by clear implication accepted it (129 Conn. at 91, 26 A.2d at 586).

3. This Court may take judicial notice of the statement of the Connecticut official charged with administration of State laws pertaining to the sale of drugs that certain contraceptive devices may be prescribed by physicians for therapeutic purposes. In a letter dated September 15, 1954, which is a public record under Section 1-19 of the Connecticut General Statutes, the Commissioner of Food and Drugs wrote to the Secretary of the Bridgeport Pharmaceutical Association:

"Since diaphragms have such therapeutic and other uses there is no reason why vaginal diaphragms may not be prescribed or ordered by a physician and such order filled by a pharmacist."

4. This Court may also take judicial notice that no prosecution has ever been brought in Connecticut charging violation of Section 53-32 by prescription, sale or use of contraceptive devices for the prevention of disease.

5. In *Poe vs. Ullman*, 367 U.S. 497, 502 (1961), the majority opinion noted: "We are advised by counsel for appellants that contraceptives are commonly and notoriously sold in Connecticut drug stores." And the Court relied upon this fact. In the trial of the case at bar the effort of appellants to introduce evidence to prove the statement made by counsel in *Poe* was ex-

cluded as irrelevant (R. 24-5). We repeat the statement of counsel in the *Poe* case.

In summary, then, Sections 53-32 and 54-196 do not apply to the use of contraceptive devices other than for prevention of conception, but for that purpose their use is precluded completely and without any exception.

SUMMARY OF ARGUMENT

I. Appellants, as defendants in a criminal prosecution, have standing to raise the constitutional issues presented here. Having this standing, they may raise all subsidiary questions bearing on the validity of the statutes, including the constitutional rights of their patients and potential patients:

II. The Connecticut anti-contraceptive statutes deny appellants the right to liberty and property without due process of law in violation of the Fourteenth Amendment:

A. The issues here are governed by the rules of due process as applied in cases where the governmental regulation touches upon fundamental individual and personal rights, not as applied in cases which involve commercial and property rights.

B. The legislative objectives sought by the Connecticut statutes have never been clearly enunciated, and hence the deference due the legislative judgment in this case is minimal.

C. The statutes, if designed as a health measure, are not reasonably related to the achievement of that objective, and are arbitrary and capricious.

D. The statutes were not intended as a device to maintain or increase the population of Connecticut and, if they were, would not constitute a reasonable method of achieving that objective.

E. If it were an objective of the statutes to restrict sexual intercourse to the propagation of children, that would not be a proper legislative purpose.

F. The statutes, considered as an effort to promote public morality by prohibiting the use of certain extrinsic aids to avoid conception, even within the marital relation, do not meet the applicable standards of due process. Where legislation is designed to promote public morality, due process requires that (1) the moral practices regulated by the statute be objectively related to the public welfare; or (2) if such is not the case (assuming this in itself is not sufficient to invalidate the statute), then the regulation must conform to the predominant view of morality prevailing in the community; in any event (3) the operation of the statute, weighing benefits against detriments, cannot be arbitrary or capricious. The statutes here fail to meet any of these tests.

G. The statutes, considered as an effort to protect public morals by discouraging sexual intercourse outside the marital relation, are not reasonably designed to achieve that end and impose restrictions on fundamental liberties far beyond what is necessary to accomplish such a purpose.

III. The Connecticut statutes violate due process in that they constitute an unwarranted invasion of privacy. Whether one derives the right of privacy from a composite of the Third, Fourth and Fifth Amendments, from the Ninth Amendment, or from the "liberty" clause of the Fourteenth Amendment, such a constitutional right has been specifically recognized by this Court. Although the boundaries of this constitutional right of privacy have not yet been spelled out, plainly the right extends to unwarranted governmental invasion of (1) the sanctity of the home, and (2) the intimacies of the sexual relationship in marriage. These core elements in the right to privacy are

combined in this case. As Mr. Justice Douglas and Mr. Justice Harlan, the only Justices to reach the merits in *Poe vs. Ullman*, have pointed out, the Connecticut statutes constitute a shocking invasion of the protected private sector of life.

IV. The Connecticut statutes violate the First Amendment as incorporated in the Fourteenth:

A. The statutes are invalid on their face because they apply to "counseling" and other areas of speech.

B. The findings and conclusions of the trial court rested upon conduct within the area of protected speech. This failure of the courts below to separate speech from action renders the application of the statutes in this case invalid.

POINT I.

Appellants Have Standing To Raise The Constitutional Issues Presented Here. Having This Standing They May Raise All Subsidiary Questions Bearing On The Validity Of The Statutes, Including The Constitutional Rights Of Their Patients And Potential Patients.

The question involved in *Poe vs. Ullman*, 367 U.S. 497 (1961) — that the Connecticut statutes have not been enforced — is no longer at issue here. By this prosecution Connecticut is attempting to enforce Sections 53-32 and 54-196 against these appellants. The fact that this prosecution, like the *Nelson* prosecution, is directed against the operation of a birth control center does not affect the issue. Plainly this case involves a real, not a hypothetical, controversy.

As defendants in a criminal prosecution, appellants have standing to assert that the Connecticut statutes applied to them deprive them of due process of law and the right to freedom of speech under the United States Constitution, — issues consistently pressed by them throughout this litigation. Having standing to raise these issues, appellants may invoke in support of their position the rights of other persons affected by the operation of the statutes. These conclusions follow from the following considerations:

A.

Appellant Buxton, as a licensed physician, has a property right in the practice of his profession. Appellant Griswold, as Director of the Planned Parenthood League and as Acting Di-

rector of the Center, has a similar property right to engage in her occupation. Appellant Buxton also has the right to use assistants necessary to his practice. This Court has consistently held that these property rights may be restricted by State legislation only if such legislation meets the standards of due process of law under the Fourteenth Amendment. *Dent vs. West Virginia*, 129 U.S. 114 (1889); *Pierce vs. Society of Sisters*, 268 U.S. 510 (1925); *Wieman vs. Updegraff*, 344 U.S. 183 (1952); see also *Truax vs. Raich*, 239 U.S. 33 (1915).

Since appellants are asserting their own constitutional rights to enjoy property they may also invoke the rights of persons with whom they have a professional relationship upon which their property rights depend. Thus, in *Truax vs. Raich*, *supra*, an employer was permitted to assert the rights of his employees; and in *Pierce vs. Society of Sisters*, *supra*, the owners of a private school were entitled to assert the rights of potential pupils and their parents. See also *Bantam Books, Inc. vs. Sullivan*, 372 U.S. 58, 64-5, footnote 6 (1963).

Furthermore, since the standards of due process require that the State legislation be not arbitrary, capricious or unreasonable, and since appellants challenge the statutes as invalid on their face, appellants may present to this Court all arguments touching upon the arbitrary character of the law, whether those features affect appellants directly or indirectly. *Aptheker vs. Secretary of State*, 378 U.S. 500 (1964); *Baggett vs. Bullitt*, 377 U.S. 360 (1964); *Cramp vs. Board of Public Instruction*, 368 U.S. 278 (1961); *Butler vs. Michigan*, 352 U.S. 380 (1957); *Thornhill vs. Alabama*, 310 U.S. 88 (1940). Indeed, the very meaning of attacking a statute as void on its face is that the statute is invalid in all its applications, not merely in its appli-

cation to the particular party bringing the challenge.¹

B.

Appellants' liberties, also protected under the due process clause of the Fourteenth Amendment, are likewise restricted by the statutes involved here. Under our constitutional system appellants have the right to engage in activity, public or private, for the betterment of mankind or for the pleasure of themselves, as individuals or in association with others, and governmental restrictions upon such activities must conform to the standards of due process of law. As this Court said in *Meyer vs. Nebraska*, 262 U.S. 390, 399 (1923), "Without doubt, [that liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." And the Court has recognized and protected against unconstitutional infringement not only the liberty of individuals to learn, as in *Meyer*, but the liberty to conduct a school (*Pierce vs. Society of Sisters, supra*); to form an association for advancement of civil rights

¹ Appellee, in its Motion to Dismiss Appeal, argued that appellants had raised below only the question whether the statutes were invalidly applied in this case, and not the question of whether they were invalid on their face (pp. 3-5). This is not correct. It is true that, in order to make clear the difference between this case and *Tileston vs. Ullman*, 318 U.S. 44, appellants asserted that the statutes "as applied to" them were unconstitutional (see, e.g., R. 2, 8, 35-6, 54). But appellants consistently asserted that the statutes were void as a whole, not only in their application in this case (see e.g., R. 27, 34). And the three courts below all dealt with the constitutional issues on this basis (see, e.g., R. 9-11, 46-7, 47-8, 62-3).

(*N.A.A.C.P. vs. Alabama ex rel. Patterson*, 357 U.S. 449 (1958)); and to travel (*Aptheker vs. Secretary of State, supra*). The action of these appellants, in opening a center to deal with the human and social problems of parenthood and population, clearly falls within this category of protected liberty.

In addition appellant Buxton, at least, invokes another form of liberty: the right to intellectual freedom in the pursuit of knowledge in his chosen field of inquiry, and the right to practice his profession in accordance with scientifically accepted principles. Such liberties, also, have been given recognition by this Court. *Wieman vs. Updegraff*, 344 U.S. at 195-198 (concurring opinion); *Sweezy vs. New Hampshire*, 354 U.S. 234, 250-1, 261-4 (1957); *Barenblatt vs. U.S.*, 360 U.S. 109, 112 (1959); *Baggett vs. Bullitt*, 377 U.S. at 369-72. They are closely related to the fundamental right to freedom of expression, guaranteed by the First Amendment, but differ in that they may involve action as well as expression. Their protection against arbitrary or capricious government control demands special scrutiny.

Since appellants have standing to raise these issues, as in the case of their claims based on property rights, they may assert the rights of others which affect enjoyment of their own rights and, challenging the statutes on their face, may advance all considerations pertaining to the arbitrary character of the statutes as a whole. See cases cited *supra* in subsection A.

C.

It is conceded that, by Connecticut law, in order to convict under the aiding and abetting statute (Section 54-196), the court must find that an offense has been committed under the principal statute (Section 53-32). *State vs. Wakefield*, 88 Conn. 164, 90 A. 230 (1914); R. 12. Obviously, the principal offense

must be one which can constitutionally be made an offense. Were this not so, the aiding and abetting statute would constitute a denial of due process of law. Hence it is necessary for the Court here to consider, on all applicable constitutional grounds, the validity of Section 53-32. In fact, appellants cannot assert their rights under the due process clause except by attacking the validity of the use statute. The Court has consistently followed this principle in similar situations. *N.Y. Central R.R. Co. vs. White*, 243 U.S. 188, 197 (1917); *Mountain Timber Co. vs. Washington*, 243 U.S. 219, 234 (1917); *Anderson National Bank vs. Lockett*, 321 U.S. 233, 240-7 (1944); *International Harvester Co. vs. Wisconsin Dept. of Taxation*, 322 U.S. 435, 440 (1944); *Hanson vs. Denckla*, 357 U.S. 235, 244-5 (1958). See also *U.S. vs. Raines*, 362 U.S. 17, 20-4 (1960). In other words, the constitutional rights of appellants here are assimilated to the rights of persons affected by the principal statute, and appellants are entitled to raise all issues which such persons could raise.

D.

Appellants are also entitled to invoke the rights of other persons subject to Section 53-32 under the doctrine of such decisions as *Barrows vs. Jackson*, 346 U.S. 249 (1953). In that case a white defendant, party to a racially restrictive covenant, was being sued for damages by the covenantor who claimed that the defendant had conveyed the property to a Negro in violation of the covenant. The Court held that the defendant could raise the issue that enforcement of the covenant violated the rights of Negroes to equal protection of the laws, although no Negro was a party to the suit. The decision rested primarily upon grounds that, unless the defendant was permitted to raise the issue, important constitutional rights would not be effectively protected.

A comparable situation exists in the case at bar. Appellants, as defendants to a criminal prosecution, have standing as parties to the proceeding. At stake in the litigation are fundamental rights of other persons affected by the operation of the statute. Those persons are connected with appellants, not by contract, but through a professional relationship, as patients or potential patients at the Center. In view of *Tileston vs. Ullman*, and the lack of active enforcement against individual violators of Section 53-32, the rights of those persons are not likely to be effectively protected unless they are considered by the Court in this litigation.

Other cases of a similar nature, where parties to a litigation have been allowed to assert the rights of other persons whose interests were closely linked with the outcome of the proceeding, include *Truax vs. Raich*, 239 U.S. 33 (1915); *Meyer vs. Nebraska*, 262 U.S. 390 (1923); *Pierce vs. Society of Sisters*, 268 U.S. 510 (1925); *Adler vs. Board of Education*, 342 U.S. 485 (1952); *N.A.A.C.P. vs. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *N.A.A.C.P. vs. Button*, 371 U.S. 415 (1963). See also *Joint Anti-Fascist Refugee Committee vs. McGrath*, 341 U.S. 123 (1951); *Mapp. vs. Ohio*, 367 U.S. 643 (1961); *Sedler, Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 Yale L.J. 599 (1962).

Tileston vs. Ullman, 318 U.S. 44 (1943), is not apposite here. The party seeking to raise the issues in that case was a plaintiff in a declaratory judgment action, a form of proceeding where the requirements of standing are especially strict. Most important, the plaintiff physician there raised no issue of his own rights. "The sole constitutional attack upon the statutes," the Court emphasized, "is confined to their [the patients'] deprivation of life — obviously not appellant's." 318 U.S. at 46. And, so far as appeared in that case, there was no bar to those pa-

tients raising the issues in their own behalf in another proceeding.

Here the parties are defendants in a criminal prosecution. They raise constitutional defenses based upon their own rights to liberty and property under the Fourteenth Amendment, and to freedom of expression under the First and Fourteenth Amendments. Their guilt under the accessory statute depends upon a constitutionally valid offense having been committed by their patients. And it is now clear that the constitutional right to operate a birth control center, and of persons unable to afford private medical advice to make use of those facilities, can only be effectively protected through this litigation.

For these reasons, we submit, appellants not only have standing to raise the constitutional questions presented here, as the action of the State directly affects them, but they are also entitled to have the Court consider all aspects of the operation of the statutes under attack, including the constitutional rights of their patients and potential patients.

POINT II.

The Connecticut Anti-Contraceptive Statutes Deny Appellants The Right To Liberty And Property Without Due Process Of Law In That They Are Arbitrary And Capricious, And Have No Reasonable Relation To A Proper Legislative Purpose.

A. The Basic Standards Of Due Process.

In *Meyer vs. Nebraska*, 262 U.S. 390 (1923), a State statute which prohibited the teaching of the German language to pupils who had not passed the eighth grade was attacked on due process grounds as violating the right of teachers to teach and parents to instruct their children. Holding the statute invalid, this Court laid down the requirements of the due process clause in the following terms:

"The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts." (pp. 399-400).

In *Nebbia vs. New York*, 291 U.S. 502 (1934), a State statute regulating the price of milk was attacked on due process grounds as violating the right of commercial enterprises to conduct their business without arbitrary governmental restrictions. Upholding the validity of the statute, the Court restated the requirements of the due process clause:

"If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary

trary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio*." (p. 537).

The standards imposed on State legislatures by the due process clause are thus well settled. In sum, they are that the legislation (1) must have a reasonable relation (2) to a proper legislative purpose, and (3) be not otherwise arbitrary or capricious.

In applying this doctrine, however, it is vital to emphasize the difference between the two situations typified by *Meyer* and *Nebbia*. In *Meyer* the legislation touched upon rights of a fundamental individual and personal character, essential to maintaining the independence, integrity and private development of a citizen in a highly organized, yet democratic, society. In *Nebbia* the legislation dealt with economic regulation of commercial and property rights, essential to maintaining the public interest in controlling a highly complex, industrialized society. The distinction is basic in striking the balance between public interest and private right in a modern, technologically developed nation.

And it follows that the function of this Court in reviewing legislation must be somewhat different in the two situations. The Court has, indeed, recognized this difference. Since *Nebbia* it has uniformly applied due process standards to allow Federal and State legislatures full leeway in their judgments as to the need and propriety of all types of economic regulation. See, e.g., *West Coast Hotel Co. vs. Parrish*, 300 U.S. 379 (1937); *Lincoln Federal Labor Union vs. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949); *Berman vs. Parker*, 348 U.S. 26 (1954); *Williamson vs. Lee Optical Co.*, 348 U.S. 483 (1955). At the same time it has subjected to much more intensive scrutiny under the due process clause legislation which impairs the

freedom of the individual to live a fruitful life or to sustain his position as citizen rather than subject. *Pierce vs. Society of Sisters*, 268 U.S. 510 (1925); *Wieman vs. Updegraff*, 344 U.S. 183 (1952); *Slochower vs. Board of Education*, 350 U.S. 551 (1956); *Schware vs. Board of Bar Examiners*, 353 U.S. 232 (1957); *Aptheker vs. Secretary of State*, 378 U.S. 500 (1964).

The rights at stake in this litigation plainly fall within the latter category. Although regulation of the medical profession may at times involve restriction of commercial activities, or concern the needs of the public for safe and competent medical practices, that is not the thrust of the legislation here. Rather, the rights of appellants being abrogated are the right to practice medicine in accordance with scientifically accepted medical principles, the right to disseminate information, and the right to make available safe and effective medical services to those members of the community unable to afford or ignorant of the private facilities. And the rights of appellants' patients, also at stake here, are even more personal and equally fundamental. They concern the most intimate aspects of the marital relationship, the right to plan a family, the right to happiness, to health and even to life itself. State legislation impinging on these rights, we submit, should be subjected to the most careful inspection by this Court.

We are not, in short, asking here for reinstatement of the line of due process decisions exemplified by *Lochner vs. New York*, 198 U.S. 45 (1905). But we are asking the Court to adhere to the principles of the *Meyer* case:

"That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected." (262 U.S. at 401).

B. The Objectives Of The Connecticut Statutes.

In order to apply the standards of due process to the Connecticut statutes here involved, it is first necessary to determine the precise objectives sought to be achieved by the legislature. Yet the purposes of the law are shrouded in obscurity. Section 53-32 was originally passed in 1879, as part of an amendment to the general obscenity statute, entitled "An Act to Amend an Act concerning Offenses against Decency, Morality, and Humanity."¹ It is a relic of Comstockery, a psychological attitude which, if it ever were, is no longer part of the mainstream of American life and thought.² It was modeled on the Federal law of 1873, 17 Stat. 598, and was comparable to legislation passed in a number of other States during the Comstock period.³ But, with the exception of Connecticut and Massachusetts, those laws have not been construed as prohibiting the type of activities in which appellants here engaged.⁴

From the four decisions in which the Connecticut Supreme Court of Errors has dealt with the statutes (Statement of the

¹ Chapter 78 of the Public Acts of 1879. In a revision of the General Statutes in 1888, the obscenity law was broken up, and the part dealing with contraceptives was put in a separate section. Gen. Stats., 1888, § 1539. The 1879 amendment and the prior obscenity statute are quoted in the dissenting opinion of Judge Avery in *Tileston vs. Ullman*, 129 Conn. 84, 98-9, 26 A.2d 582, 589.

² See Broun and Leech, *Anthony Comstock* (1927); Haney, *Comstockery in America* (1960), pp. 18-25.

³ See Dennett, *Birth Control Laws* (1926), pp. 19-29.

⁴ See, e.g., *Bours vs. U.S.*, 229 F. 960 (C.A. 7, 1915); *Youngs Rubber Corp. vs. C. I. Lee & Co.*, 45 F.2d 103 (C.A. 2, 1930); *Davis vs. U.S.*, 62 F.2d 473 (C.A. 6, 1933); *U.S. vs. One Package*, 86 F.2d 737 (C.A. 2, 1936); *Consumers Union of U.S. vs. Walker*, 145 F.2d 33 (C.A. D.C., 1944). See Comment, *The History and Future of the Legal Battle Over Birth Control*, 49 Conn. L.Q. 275, 283-5, (1964).

Case, *supra*) we have endeavored to cull all the various objectives which have been suggested at one time or another. Apart from general, and unenlightening, references to public "health," "safety," "morals," and "welfare," the more specific possible legislative purposes may be listed as follows:

(1) To protect persons from the use of drugs or devices injurious to health or life. *State vs. Nelson*, 126 Conn. at 425, 11 A.2d at 862.

(2) To maintain and increase the population. *State vs. Nelson*, 126 Conn. at 425-6, 11 A.2d at 862.

(3) To restrict sexual intercourse to the propagation of (legitimate) children. *State vs. Nelson*, 126 Conn. at 425, 11 A.2d at 862; *Tileston vs. Ullman*, 129 Conn. at 90, 26 A.2d at 585.

(4) To promote public morals by prohibiting the use of particular methods of avoiding conception, *i.e.* those employing extrinsic aids, even within the marital relation. *State vs. Nelson*, 126 Conn. at 424, 11 A.2d at 861.

(5) To protect public morals by discouraging sexual intercourse outside the marital relation. *State vs. Nelson*, 126 Conn. at 421, 424-5, 11 A.2d at 860, 861-2; *Tileston vs. Ullman*, 129 Conn. at 90, 26 A.2d at 585-6.

The Supreme Court of Errors has never clearly declared which one, or which combination, of these possible objectives the Connecticut legislature in 1879 sought to achieve. Indeed, in its last three decisions that Court seems to have abandoned the attempt to state the legislative purpose altogether. Under such circumstances the deference owed by this Court to the legislative judgment is surely minimal.

Of the possible objectives listed, most probably only the last two require serious consideration. Nevertheless we undertake

in the following sections to apply the standards of the due process clause to each one, in the order given above.

It should be added that the issues must be decided here on the basis of current circumstances, not those existing in 1879 or earlier this century. *Block vs. Hirsh*, 256 U.S. 135, 155. (1921); *Chastleton Corp. vs. Sinclair*, 264 U.S. 543, 547-8 (1924); *Brown vs. Board of Education*, 347 U.S. 483, 492-3 (1954). Hence the material we present will deal with existing knowledge and conditions.

C. The Statutes, If Designed As A Health Measure, Are Not Reasonably Related To The Achievement Of That Objective, And Are Arbitrary And Capricious.

In *State vs. Nelson* the Connecticut Supreme Court of Errors somewhat casually remarks that, "Like an advertisement representing that and how venereal disease can be easily and cheaply cured, information and advice as to means, or furnishing materials intended for, contraception may be said to have a decided tendency to . . . expose interested and uninformed persons to dangers from the use of drugs and devices injurious to health or even life." 126 Conn. at 424-5, 11 A.2d at 861-2.

It seems most unlikely, in view of the Comstockian background, that the Connecticut legislature had any such health purpose in mind. In any event, the legislation is not reasonably related to the achievement of that end. Contraceptive drugs or devices are not inherently harmful or dangerous. On the contrary, as will be shown later, their prescription is accepted medical practice; and in many cases they are the safest and most effective way to preserve health and life (see Section F, *infra*). Whatever threat to health they might possibly entail, if sold without restriction, can be met by conventional measures for licensing and supervision, as is done in the case of

thousands of other medical products and as is done in the case of contraceptive devices in other States. Indeed, food and drug legislation designed to safeguard the public health has during the last few years reached a high point in extensive application and effective administration. To seek protection of the public health by prohibiting the use of contraceptive devices entirely, through a criminal statute, is absurd. And to seek that protection by prosecuting a noted specialist in the use of such devices, operating through carefully safeguarded procedures in their prescription and use, is doubly absurd.

It is, in short, impossible to conceive that the health objective was a significant factor in the passage of this legislation or has been a serious consideration in retaining the law on the statute books. And, even if it were, the law goes far beyond the requirements of a health regulation, and impinges so drastically upon basic individual rights, that it cannot stand upon any basis of reasonableness. See *Shelton vs. Tucker*, 364 U.S. 479 (1960); *Louisiana ex rel. Gremillion vs. N.A.A.C.P.*, 366 U.S. 293 (1961); *N.A.A.C.P. vs. Alabama ex rel. Flowers*, 377 U.S. 288 (1964); *Aptheke vs. Secretary of State*, 378 U.S. 500 (1964).

D. The Statutes Were Not Intended As A Device To Maintain Or Increase The Population Of Connecticut And, If They Were, Would Not Constitute A Reasonable Method Of Achieving That Objective.

The Supreme Court of Errors has never actually asserted that the anti-contraceptive statutes were passed by the Legislature for the purpose of maintaining or increasing the population of the State of Connecticut. In *State vs. Nelson* the Court did refer to this possible objective, introducing it as one that had been suggested by the defendants in that case, and saying: "If,

as the defendants suggest, a purpose, either principal or incidental, was to promote a maintenance and increase of the population, that would not be an inadmissible motive and the efficacy, to that end, of the provision would be a legislative question." 126 Conn. at 425-6, 11 A.2d at 862. In no other decision has the Supreme Court of Errors ever mentioned the matter.³

There is no evidence that the Comstock laws in general, or Connecticut's in particular, were based upon any such notion of population control. Their motivation was entirely different (see Section B, *supra*). The Supreme Court of Errors clearly recognized this in twice so obviously declining to advance the argument itself. As one commentator has said, "This explanation of the statute strains credulity." Note, *Connecticut's Birth Control Law: Reviewing a State Statute Under the Fourteenth Amendment*, 70 Yale L.J. 322, 330 (1960).

Nor can the Court supply this as a current objective of the statutes, or a reason why the statutes have been left on the books. Virtually the whole world now recognizes that the current problems of population control — crucial as they are — involve limitations on, not expansion of, the population explosion (see Section F, *infra*). It cannot be assumed that the current policy of the Connecticut legislature would run so

³ The decision of the Appellate Division did refer to population control as a possible purpose of the statutes, saying:

"It is not alone for the preservation of morality in the religious sense that the legislature may have been impelled to act, but also for the perpetuation of race and to avert those perils of extinction of which states and nations have been alertly aware since the beginning of recorded history. Each civilized society has a primordial right to its continued existence and to the discouragement of practices that tend to negate its survival." R. 49.

But the Supreme Court of Errors did not refer to the point.

squarely counter to the entire direction of national and international developments in this field.

Furthermore, even if we presume that an increase in the population of Connecticut is an objective of the law, the measures adopted would not constitute a reasonable means of reaching that result. As already indicated, and as will be developed more fully later (see Section F, *infra*), the prohibitions of the law cut deeply into fundamental individual rights, including the right to protect life and health. On the other hand the factors determining the growth of population are so many and so complex,⁶ that the measures prescribed by these statutes, especially if enforced only against birth control centers, would clearly not justify the human costs. Plainly other effective alternatives, far less serious in their abrogation of individual rights, are available to the Legislature, and due process requires that such "less drastic" means be employed. *Shelton vs. Tucker*, 364 U.S. 479, 488; *Aptheker vs. Secretary of State*, 378 U.S. 500, 508, 513-4; cf. *Dean Milk Co. vs. Madison*, 340 U.S. 349, 354-6 (1951).

Certainly this Court should not go out of its way to imply this purpose to the Connecticut legislature, when the Connecticut Supreme Court of Errors has not done so and when there is no suggestion that the Connecticut legislature has ever weighed or considered these difficult and disturbing judgments.

⁶ See, e.g., Wyon, *Field Studies on Fertility of Human Populations*, in *Human Fertility and Population Problems* (Greep ed., 1962) at pp. 79-105; Symposium, *Population Control*, 25 *Law and Contemp. Prob.* 377 (1960).

E. An Objective Of The Statutes To Restrict Sexual Intercourse To The Propagation Of Children Would Not Be A Proper Legislative Purpose.

That an objective of the Connecticut statutes is to restrict sexual intercourse to the propagation of (legitimate) children has never been explicitly stated by the Supreme Court of Errors. This idea seems to be implicit, however, in that Court's quotation with approval of the opinion of the Massachusetts Supreme Judicial Court, referring to laws of the Massachusetts and Connecticut variety: "Their plain purpose is to protect purity, to preserve chastity, to encourage continence and self-restraint, to defend the sanctity of the home, and thus engender . . . a virile and virtuous race of men and women." *State vs. Nelson*, 126 Conn. at 425, 11 A.2d at 862. The Connecticut Court added: "It is reasonable to assume that similar motives underlay the adoption of our own statute in 1879." *Ibid*.

In *Tileston vs. Ullman* the Supreme Court of Errors apparently reiterated these views, citing with approval a Massachusetts decision that the legislature "might take the view that the use of contraceptives would not only promote sexual immorality but would expose the commonwealth to other grave dangers." 129 Conn. at 90, 26 A.2d at 585.

If it be an objective of the law to restrict sexual intercourse to procreation — and such an aim would be consistent with the Comstock approach — then, we submit, this is not a proper legislative purpose under the requirements of the due process clause. However, since the matter has been left vague by the Supreme Court of Errors we do not feel it necessary to argue the question *in extenso* here. Much of what is said in the next section of this brief is equally applicable to this issue. Suffice it to say at this point, that such a legislative purpose would be so contrary to the basic drives of man, so far-reaching an in-

vasion of individual liberty, and so disruptive of our marriage and family institutions as they exist today, that it cannot be conceived as falling within the police power of the State to promote morals or the general welfare. In any event, this Court, again, should not accept such a drastic view of the law without a much more clear-cut statement from the Connecticut legislature or courts that the statutes were designed to accomplish this end.

F. The Statutes, Considered As An Effort To Promote Public Morality By Prohibiting The Use Of Certain Extrinsic Aids To Avoid Conception, Even Within The Marital Relation, Are Arbitrary And Capricious And Not Reasonably Related To A Proper Legislative Purpose.

We come now to a more plausible objective of the statutes, though again one which has never been clearly articulated by the Connecticut legislature or courts. The closest approach to this position occurs in the *Nelson* decision of 1940, where the Supreme Court of Errors remarks, "... it is not for us to say that the Legislature might not reasonably hold that the artificial limitation of even legitimate child-bearing would be inimical to the public welfare and, as well, that use of contraceptives, and assistance therein or tending thereto, would be injurious to public morals." 126 Conn. at 424, 11 A.2d at 861. And later, "The legislature might regard the use of materials designed to prevent conception as prejudicial to public morals and inimical to the welfare and interests of the community, as the general dissemination of information as to how it could be accomplished, like distribution of obscene literature, plainly would be." *Ibid.*

We will assume that the Court was saying here, not that the use of all methods of avoiding conception was injurious to

public morals (see Section E, *supra*), but that the use of "artificial" methods or "materials" would be. No similar statements are to be found in the other decisions of the Supreme Court of Errors, although general references to "public morality" may have been intended to encompass this idea. See *Tileston vs. Ullman*, 129 Conn. at 90, 94, 26 A.2d at 585, 587; *Buxton vs. Ullman*, 147 Conn. at 54-5, 156 A.2d at 512.

In order to appraise this position, it is first necessary to set forth some general medical information concerning various methods of avoiding conception. Then we examine the special problem of the meaning of the due process clause in relation to legislation which has as its purpose the promotion of "public morality." Thereafter we undertake to apply these standards of due process to the precise issue of public morality raised here.

1. The Medical Background.

There are a number of methods of avoiding conception, some known and practiced for many years, others recently developed by medical science. These methods vary in the degree to which they are reliable in preventing conception. One of the most recent studies by a leading clinician includes the following table showing the results of tests of the effectiveness and reliability of some of these contraceptive methods.⁷

⁷ Garcia, *Clinical Studies on Human Fertility Control*, in Greep (ed.), *Human Fertility and Population Problems* (1963), p. 63.

<i>Method</i>	<i>Average pregnancy rate per 100 woman-years *</i>
Douche	31
Safe Period (rhythm)	24
Jelly alone	20
Withdrawal	18
Condom	14
Diaphragm (with or without jelly)	12
Enovid *	1.2

A somewhat similar grouping of the effectiveness of the various methods has been made by another leading authority in this field, Dr. Alan F. Guttmacher. His rankings, with the most reliable at the top and the least reliable at the bottom, are:

- GROUP I. Oral Pills.
- GROUP II. Diaphragm plus jelly or cream. Condom. Cervical Cap.
- GROUP III. Aerosol vaginal cream.

* This is the standard measurement of effectiveness used in these studies. To compute this rate the investigator determines for each married couple in the study the duration of exposure to the risk of pregnancy by deducting the aggregate months of married life during which conception was impossible because of pregnancy, separation, or some similar reason. The months of exposure and pregnancies of all couples under observation who used the same methods are added and the pregnancy rate per 100 woman-years of exposure computed.

In the instant study it was estimated that the average pregnancy rate without contraceptives for the same sample would have been approximately 150 to 200. See remarks of Dr. Tietze at page cited.

* Enovid is the trade name for one of the oral contraceptive pills now on the market.

- GROUP IV. Jelly or cream alone. Rhythm. Withdrawal.
- GROUP V. Suppositories. Vaginal Tablets.
- GROUP VI. Douche.

(The plastic coil inserted semi-permanently within the uterus is not yet generally available. Preliminary observations suggest that it may qualify for a Group II rating or even a rating between Groups I and II.)¹⁰

The plastic coil referred to by Dr. Guttmacher at the conclusion of the above table is only one of a number of intrauterine contraceptive devices which have been in use for a considerable period of time and are now being prescribed with far greater frequency by the medical profession.¹¹ With the new intrauterine devices the average pregnancy rates have been found to be 2.6 per 100 woman-years of exposure.¹²

To the methods just enumerated should be added abstinence and sterilization. Finally, abortion and miscarriage, while not

¹⁰ Guttmacher, *The Complete Book of Birth Control* (1963), pp. 77-8. Other authorities confirm these conclusions. See, e.g., Tietze, *The Clinical Effectiveness of Contraceptive Methods*, 78 *American Journal of Obstetrics and Gynecology* 650 (1959); Calderone (ed.), *Manual of Contraceptive Practice* (1964), p. 232.

¹¹ Tietze and Lewit (ed.), *Intra-Uterine Contraceptive Devices*, Proceedings of the Conference, April 30 - May 1, 1962, New York City, International Congress Series No. 54, published by Excerpta Medical Foundation.

¹² *Cooperative Statistical Program for the Evaluation of Intra-uterine Contraceptive Devices*, 4th Progress Report; June 30, 1964.

In this connection it is interesting to note that the medical profession has been unable to determine the mechanism of the intra-uterine devices. There is thus an interesting medical question with serious legal overtones as to whether such devices should properly be classed as contraceptives or as abortifacients. See, for instance, the comments of Dr. Calderone and Dr. Lehfeldt in *Intra-Uterine Contraceptive Devices*, *supra* note 11, at p. 110.

encompassed within the term "contraceptive," play an important role in birth control.

The objective of the Connecticut statutes — according to the premise we are now indulging — is to promote public morality by making it a criminal offense to prevent conception by some of the methods set forth above, but not others. The use of "any drug, medicinal article or instrument" would seem to include all the methods enumerated except withdrawal, abstinence, and the rhythm method (unless the rhythm method is supplemented by other means as noted *infra*). Those methods proscribed are sometimes referred to as "artificial" aids to contraception, as distinct from "natural." But we shall use the less pejorative term "extrinsic."

The Connecticut statutes, however, make a significant exception to the general rule. Sterilization, which involves use of an "instrument," is permitted under Connecticut law in certain medically prescribed situations. Conn. Gen. Stats., Sections 17-19 and 53-33. Abortion is also lawful in some similar circumstances. Conn. Gen. Stats., Sections 53-29 and 53-30.

It should also be noted that the distinction between extrinsic aids and other methods is not wholly clear-cut. Several types of "rhythm calendars" have been put on the market as an aid to determining the "safe" period in the use of the rhythm method. There are also available for the same purpose special thermometers, chemicals to test the urine, and vaginal tampons to determine the presence of a substance which indicates ovulation time.¹³

¹³ In *State vs. Nelson*, 126 Conn. at 427, 11 A.2d at 862-3, the Supreme Court of Errors stated that the use of calendars is not prohibited by Section 53-32. That Court has not passed upon the legality of the other devices which may be used in aid of the rhythm method of preventing conception.

In any event, allowing for these exceptions and ambiguities, the precise issue is whether the prohibition of those methods selected by the Connecticut legislature, viewed as a regulation to promote the public morality, conforms to the standard of due process of law.

2. The Standards Of Due Process In Legislation Aimed At Promotion Of Public Morality.

When legislation is designed to promote health, safety, or the general welfare in a material sense, its validity under the due process clause can be tested by considerations that can be objectively determined and rationally weighed. Questions of whether the statute is arbitrary or capricious, or has a reasonable relation to a proper legislative purpose, turn in such cases upon factual material which can be discovered and presented to the court, and upon value judgments which are subject to exposition and debate. The Brandeis brief is, of course, a classic illustration of this approach to the due process clause.

When the legislation is designed to promote public morality, however, the problem of applying the standards of due process may take a different form. In some cases, such as a statute prohibiting prostitution, the moral purposes may be justified by reference to objective and rational factors relevant to the promotion of the general welfare. But in other cases the legislature may undertake to legislate purely on the basis of moral principles not subject to objective evaluation. In such a case, how are the customary criteria of due process to be applied?

Certainly the court cannot take the position that the simple claim of a moral aim by the legislature satisfies the requirements of due process. As Mr. Justice Harlan said in *Poe vs. Ullman*, "the mere assertion that the action of the State finds justification in the controversial realm of morals cannot justify

alone any and every restriction it imposes." 367 U.S. at 545. Any such doctrine would immunize virtually all legislation from the mandate of the due process clause. It would allow the legislature to impose restraints upon individual liberties solely on the ground that some insignificant fraction of the community regarded the issue as a moral one. Thus, a law prohibiting women from appearing in public without veils, or forbidding women to use lipstick or cosmetics, even though some persons in the community might regard such practices as immoral, would surely be held an arbitrary infringement of personal liberty outlawed by the due process clause. What, then, should be the constitutional standards for applying the due process clause in cases where the legislature seeks to promote public morals?

We submit that the standard in such cases should at least be that (1) the moral practices regulated by the statute must be objectively related to the public welfare, or (2) in the event no such relationship can be demonstrated, the regulation must conform to the predominant view of morality prevailing in the community. In other words, if the legislature cannot establish that the law promotes the public welfare in a material sense, it cannot enforce the morality of a minority group in the community upon other members of the community.¹⁴

There is, so far as we are aware, no decision of the Supreme Court dealing with this exact problem. But the doctrine we urge here is fully supported by the obscenity cases. In *Roth vs. United States* a majority of the Court held that material al-

¹⁴ It may be argued that the first standard set forth above is sufficient in itself, without the second. That is, if the moral principles cannot be objectively related to the public welfare, the legislation does not, for that reason alone, meet the standards of due process. It is not necessary to take that position in order to decide this case, however, and we do not consider it further here.

leged to be obscene could not be restricted unless it met the standard that "to the *average person, applying contemporary community standards*," the dominant theme appealed to prurient interests. 354 U.S. 476, 489 (1957). And it further adopted the provision in the A.L.I. Model Penal Code that material to be obscene must go "substantially beyond *customary limits of candor*." 345 U.S. at 487.

In subsequent cases a majority of the justices have reaffirmed this view that the test of obscenity must adhere to dominant community standards. Thus in *Manual Enterprises vs. Day*, Mr. Justice Harlan and Mr. Justice Stewart declared that, in order to sustain a conviction under Federal obscenity laws, the materials must be "deemed so offensive on their face as to affront *current community standards* of decency." 370 U.S. 478, 482 (1962). In *Jacobellis vs. Ohio*, Mr. Justice Brennan and Mr. Justice Goldberg, again referring to the A.L.I. Model Penal Code, repeated that obscenity must involve "a deviation from *society's standards of decency*." 378 U.S. 184, 191-2 (1964). In the same case Mr. Chief Justice Warren and Mr. Justice Clark expressly affirmed their support for the *Roth* rule. 378 U.S. at 199-200. Mr. Justice Harlan stated he would apply the *Roth* rule only to the Federal Government. 378 U.S. at 204. Mr. Justice Stewart, although employing the "hard core pornography" test, did not alter his views on the subject of community standards. 378 U.S. at 197.¹⁵

¹⁵ The position that the community standards involved may be local rather than national standards is, as we read the cases, held by only three members of the Court: Mr. Chief Justice Warren, Mr. Justice Clark, and Mr. Justice Harlan.

Mr. Justice Black and Mr. Justice Douglas, of course, apply the standard that the First Amendment precludes any form of restriction upon expression alleged to be obscene. See *Roth vs. United States*, 354 U.S. at 508-14; *Jacobellis vs. Ohio*, 378 U.S. at 196-7. Hence their position does not employ the criterion of community standards.

The obscenity cases raise the same kind of problem as do the Connecticut statutes. In fact, as already pointed out, the Connecticut legislation had its origin in the Comstock laws, which were concerned primarily with matters of obscenity and decency. In both types of legislation the question is one of enforcing moral standards. It is true that the obscenity issues deal with rights under the First Amendment. The cases are not treated under traditional First Amendment doctrine, however, but rather in terms more appropriate to due process. And the individual rights infringed by the Connecticut statutes are fully as basic as the rights curtailed by obscenity laws.

We conclude, therefore, that in applying the standards of due process to the Connecticut statutes, taken as measures to promote public morality, the Court must consider (1) whether the law is objectively related to the public welfare; and (2) if it is not, whether it attempts to enforce on the entire community moral principles not conforming to the predominant view of morality held by the community. Furthermore, under the general standards of due process (see Section B, *supra*), even if the law satisfies the two requirements just stated, it must still meet the traditional test that its general operation be not arbitrary or capricious. This requires the Court to consider (3) whether the advantages of the law are greatly outweighed by its disadvantages, taking into account that the legislation abrogates fundamental rights of the individual, including the right to health and life.

We consider these three issues in the order stated:

3. The Prohibition Against Using Extrinsic Aids To Avoid Conception, Within The Marital Relationship, Is Not Objectively Related To The Public Welfare.

Neither the Connecticut legislature nor the Connecticut courts have ever claimed that the aim of promoting public

morals through a prohibition on the use of extrinsic aids to avoid conception can be justified upon objective grounds related to the public welfare.¹⁶ That no such relationship exists is apparent from a brief review of accepted facts.

It is the virtually unanimous opinion of the medical profession that the use of extrinsic devices is not harmful to the individual either on physical or psychological grounds. The widespread use of such devices by physicians is in itself sufficient evidence of this opinion. Thus an inquiry made by Dr. Guttmacher of 3381 physicians in 1947 revealed that some 96 per cent expressed approval of contraception as a medical technique.¹⁷ Medical text books fully support the position.¹⁸ Leading medical schools throughout the country give students instruction in the use of contraceptive devices.¹⁹ Medical associations endorse the prescription of such devices in medical

¹⁶ The fifth possible purpose of the statutes — the promotion of public morality by discouraging sexual relations outside the marital status — may be objectively related to the public welfare. Our contention that, considered from this point of view, the statutes violate due process rests upon other grounds. See Section G, *infra*.

¹⁷ Guttmacher, *Conception Control and the Medical Profession*, 12 *Human Fertility* 1, 2-3 (1947).

¹⁸ See, e.g., Greenhill, *Office Gynecology* (7th ed., 1959) p. 304; Stallworthy, et al., *Problems of Fertility in General Practice* (1953), p. 132; Stone and Himes, *A Practical Guide to Birth Control Methods* (1958), pp. 78-9, 131; Tietze, *The Condom as a Contraceptive*, National Committee on Maternal Health (1960) p. 39; Dickinson, *Techniques of Conception Control* (3d ed., 1950); Calderone (ed.), *Manual of Contraceptive Practice* (1964).

¹⁹ See, e.g., Stone, *The Teaching of Contraception in Medical Schools*, 7 *Human Fertility* 108 (1942); New York Academy of Medicine, *Report of the Committee on Public Health Relations* (1946).

practice.²⁰ The Federal Food and Drug Administration allows the shipment of contraceptive devices in interstate commerce and the Post Office permits them in the mails.²¹ And the Connecticut Commissioner of Consumer Protection permits the sale on prescription for therapeutic purposes.²² In addition contraceptive devices are legally prescribed and used in 48 of the 50

²⁰ See, e.g., the policy statements adopted by the House of Delegates of the American Medical Association on December 2, 1964, which stated that "intelligent recognition of the problems that relate to human reproduction, including the need for population control, is . . . a matter of responsible medical practice," and declared: "In discharging this responsibility physicians must be prepared to provide counsel and guidance when the needs of their patients require it or refer the patients to appropriate persons . . . The prescription of child-spacing measures should be made available to all patients who require them, consistent with their creed and mores, whether they obtain their medical care through private physicians or tax or community-supported health services." (Not yet published in Journal of the American Medical Association). See also resolutions of American College of Obstetricians and Gynecologists, New York Times, April 24, 1963; American Public Health Association, adopted October 4, 1964 (not yet reported); Connecticut State Medical Society, in Proceedings, 1932, p. 76.

For additional data on the medical practice see briefs of Doctors and of Planned Parenthood Federation, Appendix B, amici curiae.

²¹ N.Y. Times, May 10, 1960 (F.D.A.); N.Y. Times, Oct. 24, 1963 (P.O.).

²² Formerly titled the Commissioner of Food and Drugs. See Statement of the Case, *supra*.

States of the Union.²³ Indeed, in *Tileston vs. Ullman*, the Connecticut Supreme Court of Errors conceded that the "common denominator of the opinions of the various medical authorities, made a part of the record, is the professional opinion that the safest medical treatment which can be prescribed for these patients" would be the use of contraceptive devices. 129 Conn. at 91, 26 A.2d at 586.

Moreover, it cannot be argued that the use of extrinsic aids to contraception results in any injury to other individuals. Occurring in the privacy of the marital relation, such practices can have no effect whatever upon other persons. Nor has it been suggested that the use of these aids occasions any harm to marriage, family or other social institutions.

In short, no objective facts indicating harm to individuals or to society have been advanced to support the Connecticut statutes as moral prohibitions.

Indeed, quite the contrary, extrinsic aids to avoid conception are widely recognized as the best and most effective methods for solving numerous problems of individual health and well being, and for meeting many other needs arising from marriage and family relationships.

²³ The statutes are collected in Comment, *The History and Future of the Legal Battle Over Birth Control*, 49 Corn. L.Q. 275, 277-9 (1964). See also brief of Planned Parenthood Federation, amicus curiae, Appendix A.

Since 1930 the Ministry of Health in England has authorized contraceptive advice to be given in government maternal and child welfare clinics to married women for whom a pregnancy would be detrimental. *Ministry of Health Memorandum*, No. 153 (1930); *Circular 1208* (1931); *Circular 1408* (1934); *Circular 1622* (1937). Private practitioners may provide contraceptive advice regardless of the existence of medical reasons. Supplement to the British Medical Journal, Nov. 6, 1954, p. 166.

One of the most frequent reasons why a married couple may find it necessary or desirable to avoid conception relates to health. Under certain conditions a further pregnancy may surely or likely result in death. See, e.g., *Poe vs. Ullman*, 367 U.S. at 500. Under other circumstances the medical prognosis may be that a pregnancy will end in a still-birth or a deformed or otherwise defective child. *Id.* at 498-9. Numerous other health conditions, physical and mental, may dictate the medical necessity or desirability of avoiding conception.²⁴

In such situations it is accepted medical practice, so far as consistent with the religious or moral principles of the patient, to prescribe the use of extrinsic aids to avoid conception. As the data set forth above clearly demonstrate, the methods permitted by the Connecticut statutes — total abstinence, partial abstinence under the rhythm method, and withdrawal — are among the most unreliable.²⁵ They cannot safely be used, especially in cases involving danger of death or serious illness.²⁶

In addition to health factors, there are other weighty reasons for married persons to postpone or avoid pregnancy. Economically the parents may not be able to support additional children, and may not wish to inflict upon them the hardships of poverty.

²⁴ See footnote 18, *supra*. For a collection of textbook materials showing various types of health conditions in which a pregnancy may be harmful or undesirable see brief of Planned Parenthood Federation, amicus curiae, Appendix B.

²⁵ See subsection 1, *supra*. For a discussion of the medical reasons for the unreliability of the rhythm method, by an eminent authority, see Rock, *The Rhythm or Periodic Continence Method of Birth Control*, in Calderone (ed.), *Manual of Contraceptive Practice* (1964), pp. 222-8.

²⁶ Additional data showing that a proper medical solution for these health problems requires the use of extrinsic aids are set forth in the brief of Planned Parenthood Federation, amicus curiae, Appendix B.

and underprivilege, perhaps delinquency and degradation. Young couples may wish to pursue, at least for the time being, careers for which they are in training or in which they are engaged. Or they may wish "an opportunity to adjust, mentally, spiritually and physically, to each other so as to establish a secure and permanent marriage before they become parents." *Trubek vs. Ullman*, 147 Conn. at 636, 165 A.2d at 159. Spacing of children, apart from reasons of health, may be a significant consideration for many parents. For all these and other reasons, it may be vital to the well being of parents and children that the parents exercise their right to choose whether and when to have children. Yet the Connecticut statutes preclude the safest and most effective methods of achieving these wholly desirable ends.

From a broader social point of view, likewise, control of conception has become a critical factor in building a better society. Problems of poverty, delinquency, over-crowding and general human progress are closely related to planned limitation of births. But the Connecticut statutes do not permit the scientifically accepted way of approaching these pressing issues.

Furthermore, the methods of birth control allowed under the Connecticut statutes are not only unscientific and unreliable, but are likely to produce harmful effects. The Connecticut Supreme Court of Errors suggests abstinence, or partial abstinence, as a solution to the many critical and poignant problems

of unwanted pregnancy.²⁷ Even assuming its practicality, the solution is fraught with danger and unhappiness. The evidence is clear that abstinence is frequently damaging both to the individual and to society. Thus Dr. Robert L. Dickinson states the prevailing view:

"In the close relationship of married life the effect of prolonged abstinence is usually harmful to mental health and balance and to the marriage relationship and a risk to fidelity. As a birth control measure for recommendation by the physician abstinence is negligible."²⁸

Otto Fenichel, writing in 1945, mentions as among the causes of sudden aggravations of neuroses "external frustrations or blockings of instinctual satisfactions hitherto obtainable." He says: "any frustration in the realm of adult sexuality increases the intensity of the unconscious infantile sexual longings." He quotes Reich as pointing out "that during sexual excitement typical autonomic nervous reactions occur. In normal sexual intercourse these autonomic cathexes become gradually transformed into genital ones, and find a genital outlet in orgasm. If the orgasmic function is disturbed, this change

²⁷ *Tileston vs. Ullman*, 129 Conn. at 92, 26 A.2d at 586; *Buxton vs. Ullman*, 147 Conn. at 58, 156 A.2d at 514.

The "partial" abstinence required by the rhythm method is substantial. See Janney, *Medical Gynecology* (1950), p. 398: "The rhythm method for the control of conception is sanctioned by groups which oppose other methods of contraception, because it is 'natural.' It is, to be sure, more natural in the physical relationship of intercourse than the condom, the diaphragm or any of the chemical methods. Psychologically, however, it cannot be said to be as natural as these latter methods because, regardless of the inclination of husband and wife, it dictates the time when intercourse shall take place and limits its frequency by about 50% as compared to the frequency reported among normal married couples."

²⁸ *Techniques of Conception Control* (3d ed. 1950), p. 40.

does not take place. The autonomic system remains overcharged, and this fact produces anxiety."²⁹

Karen Horney discusses sexual activity as relieving neurotic tensions: "How well sexual abstinence may be endured varies with the culture and the individual. In the individual it may depend on several psychic and physical factors. It is easy to understand, however, that an individual who needs sexuality as an outlet for the sake of allaying anxiety will be particularly incapable of enduring any abstinence, even of short duration."³⁰

And Dr. John Rock has declared:

"Suppression of the coital urge directed towards his wife is possible for the intelligent considerate husband aware of a good reason why she should not become pregnant. But the urge is still there, and unless, by appropriate and effective taboos, it can be sublimated into a sexual martyrdom of which few Americans, including all colors and creeds, are capable, it will express itself in any one of the innumerable aberrancies of the primate sex function. . . . To demand prolonged continence as the only method of contraception from anyone who is not stoutly bulwarked by the strongest spiritual sanction is to drive that individual to what society has judged criminal, and which, if practiced by any number of those who should prevent pregnancy for shorter or longer periods, for reasons which have been stated, would disrupt our whole moral order."³¹

²⁹ *The Psychoanalytic Theory of Neuroses* (1945), pp. 455, 187-8.

³⁰ *The Neurotic Personality of Our Time* (1937), pp. 158-9.

³¹ *The Scientific Case Against Rigid Legal Restrictions on Medical Birth-Control Advice*, Clinics, April 1943, pp. 1609-10. Numerous other statements by medical authorities, all to the same effect, are set forth in the brief of Planned Parenthood Federation of America, amicus curiae, Appendix B.

The alternative method sanctioned by the Connecticut statutes — withdrawal or *coitus interruptus* — is recognized as even more harmful. The medical view of this method has been summarized by Kroger and Freed:

"*Coitus Interruptus* is the most widely used and oldest method of contraception. . . . It is usually responsible for a myriad of psychogenic complaints ranging from pruritus vulvae to backache. This method cannot be used by men suffering from premature ejaculation. It is also capable of producing tension in the male and is not too safe a method. The wife, too, will often develop a variety of anxiety reactions because withdrawal separates the genital organs at a time when the emotional climax is at its height, resulting in feelings of severe frustration. It is the worst possible method of birth control."³²

We are driven to the conclusion, therefore, that the Connecticut statutes, viewed as moral prohibitions upon the use of extrinsic aids to avoid conception, bear no objective relation to promotion of the public welfare, either in terms of protecting any interest of the individual or in terms of strengthening the social structure. They serve no medical purpose, or any other concrete objective related to the material welfare of the community. They are justifiable, if at all, solely as "moral principles", as a matter of religious or ethical faith.

This being so, for the reasons stated previously, the Connecticut statutes cannot satisfy the requirements of due process, at least unless the moral precepts enforced by them represent the predominant moral view of the community. To that issue we now turn.

³² *Psychosomatic Gynecology* (1951), p. 276.

4. The Prohibition Against Using Extrinsic Aids To Avoid Conception, Within The Marriage Status, Does Not Conform To The Predominant View of Morality Within The Community.

Our concern here is with the current views of the community as to the moral basis for prohibiting the use of extrinsic aids in avoiding conception. What the predominant community sentiment may have been in 1879, when the statute was enacted, is not certain. Without doubt changes have taken place during the past 86 years. For reasons already stated (see Section B, *supra*), it is not necessary to uncover that history or to trace the subsequent developments. In this prosecution the statutes must satisfy due process requirements under the facts and conditions of today.

We submit that the overwhelming opinion of today does not regard the use of extrinsic aids by married couples in avoiding conception as morally reprehensible, or at least does not regard the use of such aids by other persons as affording moral grounds for absolute prohibition by government decree. In support of this proposition we call the Court's attention to the following facts, pertaining to (a) general public opinion, (b) medical practice, (c) views of religious groups and leaders, (d) actions by the government itself, and (e) other manifestations of community opinion.

(a) General Public Opinion.

The most recent poll of the American Institute of Public Opinion (the Gallup poll), published in January of this year, reveals that 81 per cent of those questioned thought that "birth control information should be available to anyone who wants it." Only 11 per cent were opposed, and 8 per cent had no opinion.³³

³³ Hartford Courant, Jan. 13, 1965.

A few years ago an extensive study by Freedman, Whelpton and Campbell reported: "Among the fecund couples, 83 per cent had used contraception [all methods] by the time of the interview, and an additional 7 per cent (mostly young couples) plan to begin some time in the future. Only 9 per cent of the fecund couples intend never to regulate family size." And they further found: "The use of appliance methods is very extensive. Approximately 79 per cent of all users have tried such methods."³⁴

In view of this broad acceptance of birth control in general, and the widespread use of contraceptive devices in particular, it can scarcely be said that the dominant community opinion holds the adoption of such devices, even for the healthy family, morally objectionable.

(b) *Medical Practice.*

The very general prescription of contraceptive devices in medical practice has already been pointed out (see subsection 3, *supra*). Again, it is hardly likely that such an overwhelming proportion of a profession, so highly regarded by the public, would advise or employ methods considered morally reprehensible by the prevailing opinion of the community.

(c) *Religious Groups And Leaders.*

Protestant. Among Protestant groups opinion is well-nigh unanimous that the use of extrinsic aids to avoid conception is morally justified. Indeed some groups hold that proper limitation of families, by medically approved methods, may be considered a religious obligation. We cite only a brief sampling of this opinion:

³⁴ Freedman, Whelpton and Campbell, *Family Planning, Sterility, and Population Growth* (1959), pp. 242, 179.

The Lambeth Conference of Bishops of the Anglican Communion, representing 40,000,000 communicants including members of the Protestant Episcopal Church in the United States, adopted the following resolution in 1958:

"The Conference believes that the responsibility for deciding upon the number and frequency of children has been laid by God upon the consciences of parents everywhere; that the planning, in such ways as are mutually acceptable to husband and wife in Christian conscience, is a right and important factor in Christian family life and should be the result of positive choice before God."³⁵

The General Assembly of the United Presbyterian Church, in 1959, made a similar declaration:

"The 17th General Assembly

"Approves the principle of voluntary family planning and responsible parenthood,

"Affirms that the proper use of medically approved contraceptives may contribute to the spiritual, emotional and economic welfare of the family,

"Urges the repeal of laws prohibiting the availability of contraceptives and information about them for use within the marriage relationship . . ."³⁶

The Council for Christian Social Action, United Church of Christ, comprising the Congregational Christian Church and the Evangelical and Reformed Church, in 1960 stated its position as follows:

"Responsible family planning is today a clear moral duty. We believe that public law and public institutions should sanction the distribution through authorized channels of reliable information and contraceptive devices.

³⁵ *The Lambeth Conference, 1958, S.P.C.K. (1958) p. 1:57.*

³⁶ Quoted from Planned Parenthood News, Spring, 1959.

Laws which forbid doctors, social workers and ministers to provide such information and service are infringements of the rights of free citizens and should be removed from the statute books. Any hospital which receives public funds should permit doctors to provide all services they consider necessary."³⁷

And the National Council of Churches of Christ in the United States of America issued the following statement:

"Most of the Protestant churches hold contraception and periodic continence to be morally right when the motives are right. They believe that couples are free to use the gifts of science for conscientious family limitation, provided the means are mutually acceptable, non-injurious to health, and appropriate to the degree of effectiveness required in the specific situation."³⁸

In Connecticut, the Connecticut Conference of Congregational Churches at its 95th annual meeting in October 1962, adopted a resolution approving "The principle of voluntary family planning" and backed "proper use of medically approved contraceptives that may contribute to the spiritual, emotional and economic welfare of the family."³⁹

The Connecticut Council of Churches in December 1962 took like action. Its resolution said: "Christian marriage is a relationship of love and fidelity . . . [and] the sexual life within this relationship is given by God for the benefit of his children, and is neither an ethically neutral aspect of human existence, nor needs to be justified by the procreation of children." It went on to declare that the Connecticut law "restricts members of the medical profession from making known to patients

³⁷ 26 Social Action, No. 8 (April 1960), pp. 24-7.

³⁸ N.Y. Times, Feb. 24, 1961.

³⁹ New Haven Journal Courier, Oct. 11, 1962.

information they believe medically beneficial or essential to health; and denies to people access to such information . . . [It] is an invasion of the most intimate aspects of marriage and is a violation of the religious liberty of many citizens who believe it to be morally incumbent upon them to practice planned parenthood."⁴⁰

Many other Protestant organizations, as well as outstanding religious leaders, have expressed the same views. Among the latter are Dr. Harry Emerson Fosdick (Baptist), the late Rev. G. Bromley Oxnam (Methodist), Dr. Norman Vincent Peale, Bishop James A. Pike (Episcopalian), Dr. James H. Robinson (Presbyterian), and Rev. Henry P. Van Dusen (former President of Union Theological Seminary).⁴¹

Jewish. The position of the Reformed Jews is stated in a resolution passed by the 45th General Assembly of the Union of American Hebrew Congregations in 1959:

"a. We favor the elimination of all restrictions and prohibitions against the dissemination of birth control information and the rendering of birth control assistance by qualified physicians, clinics, and hospitals.

"b. We favor the wider dissemination of birth control information and medical assistance, both by private groups such as the Planned Parenthood Association, and health agencies of local, state, and the federal government as a vital service to be rendered in the field of public health."⁴²

⁴⁰ New Haven Register, Dec. 10, 1962.

⁴¹ See brief of Planned Parenthood Federation, amicus curiae, Appendix C. This Appendix includes many other statements similar to those quoted above.

⁴² *Resolutions Passed by the 45th General Assembly, Union of American Hebrew Congregations* (1959), reprinted in Planned Parenthood Federation, *The Churches Speak Up On Birth Control* (1960).

A similar view is taken by Conservative Jews, speaking through the Rabbinical Assembly:

"Proper education in contraception and birth control will not destroy, but rather enhance, the spiritual values inherent in the family and will make for the advancement of human happiness and welfare."⁴³

A minority Jewish group — the Rabbinical Alliance of America, representing Orthodox Jews — takes an intermediate position, approving the use of extrinsic aids to prevent conception under more limited circumstances:

"The Rabbinical Alliance feels itself impelled to clarify the viewpoint of Orthodox Judaism on birth control practices, which we feel has been erroneously represented. Orthodox Judaism does not condone any artificial birth control measures by the male spouse, under any circumstances. Only in cases where the health of the female is jeopardized are certain birth control measures allowed and then only through direct consultation between the medical and rabbinic authorities."⁴⁴

Catholic. The Catholic position is that the use of extrinsic aids to prevent conception is morally wrong.⁴⁵ But it sanctions the use of the rhythm method under certain circumstances. Thus Pope Pius XII, in 1951, said:

"We affirm the legitimacy and, at the same time, the limits — in truth very wide — of a regulation of offspring which, unlike so-called 'birth control,' is compatible with the law of God. One may even hope that science will

⁴³ Quoted in Planned Parenthood Federation, *The Churches Speak Up On Birth Control* (1960).

⁴⁴ N.Y. Times, Aug. 12, 1958.

⁴⁵ See, e.g., Statement of Catholic Bishops of the United States, Nov. 26, 1959, reprinted in U. S. News and World Report, Dec. 7, 1959, p. 122.

succeed in providing this licit [rhythm] method with a sufficiently secure basis."⁴⁶

The circumstances under which members of the Catholic faith may employ the rhythm method to prevent conception were stated in an authoritative Catholic publication, issued under ecclesiastical imprimatur, as follows:

"Economic burdens, the burden of poverty, of inadequate income, of unemployment which make it impossible for parents to give their children and themselves the food, the clothing, the housing, the education and the recreation they are entitled to as children of God . . ."⁴⁷

It is important to note, however, that the Catholic position does not call for government prohibition of the use of contraceptive devices by persons outside the Catholic faith. Thus Vernon J. Bourke, a distinguished philosopher, has recently written:

"Are Catholics, living as citizens of a democratic country, justified in seeking government restraint of the dissemination of information on birth-control practices? Before examining this, let us remember that we are talking about a pluralistic society, a society in which there are diverse views on the moral value of birth-control data. . . .

"Remembering that these conflicts arise because of varying notions of what is morally acceptable, I think we may say three things about them. First, each minority group has a right, even within a large pluralistic society, to censor *for its own members* the use of media seriously considered harmful for that group. Secondly, one minority group in a pluralistic society does not have a moral right

⁴⁶ Catholic Transcript, Nov. 1, 1951, p. 2.

⁴⁷ Latz, *The Rhythm of Fertility and Sterility in Women*, (6th ed. 1940), p. 147.

to demand government censoring of the expression of the foregoing sort of information *for members of other groups, who do not share the same standards.* . . ."⁴⁸

And recently an influential Catholic publication stated editorially:

"... Undoubtedly, many non-Catholics believe that they can make use of contraceptive devices without violating any divine law. Moreover, many such persons feel a positive obligation to prevent conception of offspring for one reason or another. Obviously, then, laws such as the Connecticut law under discussion try to prevent such persons from acting in a way which their consciences either permit or prescribe.

"We would not say that the state never can pass laws such as this, but that it can be done only for the gravest of reasons and when the acts outlawed are manifestly against the common good. Error has no rights, it is true, but persons — or consciences — in error do.

"From these considerations, we feel that a Catholic can justifiably favor repeal of the Connecticut and Massachusetts anticontraceptive laws, or breathe happily if they are declared unconstitutional. . . ."⁴⁹

And Cardinal Cushing of Boston was recently quoted as saying that, should a proposal come before the Massachusetts legislature for repeal of the anti-birth control statute in that

⁴⁸ *Moral Problems in Censoring*, 40 Marq. L. Rev. 57, 68 (1956). Italics are in the original. See also John Courtney Murray, in John Cogley (ed.) *Religion in America* (1959), pp. 32-3.

⁴⁹ Ave Maria, June 16, 1960, 16. For a collection of similar Catholic views on the Connecticut statute, see Rock, *The Time Has Come* (1963), Ch. 10.

state, "in no way will I feel it my duty to oppose amendments to the law."⁵⁰

Moreover, there is substantial evidence that Catholic views on birth control are undergoing reconsideration. Thus the Gallup poll, referred to above, revealed that in January 1965 78 percent of Catholics approved making birth control information available, whereas in June 1963 only 53 percent favored that position.⁵¹ And last summer Pope Paul VI appointed a special commission to study the problem of overpopulation and birth control. At that time he said, "... the question is being subjected to study, as wide and profound as possible, as grave and honest as it must be on a subject of such importance."⁵²

(d) *Federal, State And Local Government.*

For many years the Federal Government has acted in a manner wholly inconsistent with any premise that the use of extrinsic aids to avoid conception is morally objectionable. Thus contraceptives have long been made available to members of the armed forces.⁵³ During World War II the War Production Board, whose function it was to allocate scarce commodities, promulgated regulations providing sufficient materials for

⁵⁰ Dorsey, *Changing Attitudes Toward the Massachusetts Birth-Control Law*, 271 *New England Journal of Medicine* 823, 826 (1964).

⁵¹ *Hartford Courant*, Jan. 13, 1965.

⁵² *New York Times*, June 24, 1964. For further evidence of reconsideration of the Catholic position, see the series of four articles in the *New York Times*, Aug. 5, 6, 7 and 8, 1963. See also the petition to Pope Paul VI and the Ecumenical Council, by 182 prominent Catholic laymen of 12 learned professions, asking for a "far-reaching reappraisal" of the Church's teachings on birth control. *N.Y. Times*, Oct. 20, 1964. And see Rock, *The Time Has Come* (1963).

⁵³ See, e.g., Freedman, Whelpton and Campbell, *Family Planning, Sterility, and Population Growth* (1959), p. 177.

the manufacture of contraceptives for men and women at 100 per cent of the 1940-1941 production level.⁵⁴ Federally sponsored hospitals, available to personnel of the armed services, provide contraceptive advice and care.⁵⁵ Recently the Department of Health, Education and Welfare announced that "Information on the prevention of pregnancy similar to that provided in the normal course of a doctor-patient relationship may be provided Indian beneficiaries of the Public Health Service."⁵⁶

In May of last year Federal funds were provided by Congress for a program of full birth control service in the District of Columbia, available to all mothers delivered of a child at the District of Columbia General Hospital and to women qualifying for welfare assistance.⁵⁷ And in January of this year the Office of Economic Opportunity made a grant of funds to Corpus Christi, Texas, earmarked to provide birth control information and mobile birth control clinics.⁵⁸

The pattern in State and local governments is the same. As already noted, the prescription and use of contraceptive devices, at least under some circumstances, is lawful in 48 of the 50 States.⁵⁹ More significant for the issue here, in many States

⁵⁴ War Production Board, Supplementary Order No. M-15-b, List C, issued January 24, 1942.

⁵⁵ See, e.g., letter in Army Times, Nov. 15, 1961.

⁵⁶ H.E.W., Public Health Service, Division of Indian Health, Circular No. 6 S-2, dated Jan. 21, 1963. See also H.E.W., *A Survey of Research on Reproduction Related to Birth and Population Control*, Public Health Service Publication No. 1066 (1963).

⁵⁷ Washington Post, Mar. 18, 1964; District of Columbia Government, Department of Public Health, *Birth Control Program: Policies and Procedures Manual* (May 1, 1964). In the first months of the program well over 1200 women received such care.

⁵⁸ N.Y. Times, Jan. 6, 1964. The Times reports that at least two other cities — Milwaukee and Washington — are seeking similar grants.

⁵⁹ See footnote 23, *supra*.

and localities the government operates positive programs to make contraceptive devices available to persons desiring to use them. According to a survey by the American Public Health Association, health departments in 27 States now offer some form of family planning services either through clinics of their own or through referrals to other agencies. These States are Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Maryland, Michigan, Mississippi, Missouri, Nebraska, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, Wisconsin.⁶⁰

Many local governments follow the same practice. In addition to Corpus Christi (*supra*), in New York City, under a Federal grant totalling \$1,462,718, five clinics operated for the city by cooperating hospitals have provided birth control advice and materials since October 1, 1964.⁶¹ Health authorities in Dallas County, Texas, conduct free birth control clinics and send mobile units to dispense advice and contraceptives throughout the county.⁶² In Dade County, Florida, the Public Health Department furnishes free contraceptive pills to welfare recipients.⁶³ The city authorities of Pasadena, California, distribute birth control information and supplies in low-income

⁶⁰ American Public Health Association, *Report of the Committee on Family and Population Planning* (1964). The Children's Bureau of the Department of Health, Education and Welfare now permits State health departments to include funds for family planning in the Federal grants made for maternity and infant care programs. N.Y. Times, Jan. 22, 1965.

⁶¹ N.Y. Times, Jan. 7, 1965. Two of the hospitals are Catholic and limit their techniques to the rhythm method. Other clinics are planned. Each clinic can handle about 1000 cases a year. *Ibid.*

⁶² Edinburgh Valley Review, July 17, 1963.

⁶³ Miami Florida Herald, Aug. 24, 1963.

sections. ⁶⁴ Many other local health agencies in California, and five counties in Colorado, have established birth control programs. ⁶⁵

(e) *Other Manifestations Of Community Opinion.*

It is hardly necessary to accumulate further data on this point. The following facts may, however, be noted:

The White House Conference on Children and Youth in 1960 adopted the following resolution:

"We recommend that planning for the size of families is desirable in order to relieve the deprivation of children. Thus, facilities and programs on a local public or private basis should be available to married couples to provide medical advice and services for child spacing. These should be consistent with the creed and mores of the families served." ⁶⁶

The American Assembly, at its meeting in Harriman, New York, in 1963 recommended:

"Assumption of responsibility by the federal, state and local governments for making available information concerning the regulation of fertility and providing services to needy mothers compatible with the religious and ethical beliefs of the individual recipients." ⁶⁷

In August 1964 the Republican Citizens Committee made public its Critical Issues Paper No. 12, recommending, *inter alia*:

"That the United States Public Health Service provide appropriate leadership and assistance to state and local

⁶⁴ Washington Post, Mar. 10, 1963.

⁶⁵ Planned Parenthood Federation, *Current Family Planning Programs and Developments in Tax Supported Agencies* (1959).

⁶⁶ N.Y. Times, Jan. 24, 1960.

⁶⁷ N.Y. Times, May 6, 1963.

health departments in offering help to disadvantaged citizens in the regulation of birth by means which accord with their religious beliefs and individual preferences."⁶⁸

The 1964 Convention of the Young Women's Christian Association adopted a resolution recommending support for the development of appropriate channels for the widest possible sharing of knowledge so that individuals and governments are enabled to obtain family planning information of such variety as to serve those of different creeds, mores and in different circumstances."⁶⁹

Some 222 Planned Parenthood Federation birth control clinics are operating throughout the country.⁷⁰

Our two living former Presidents — President Truman and President Eisenhower — are serving as Co-Chairmen of the Honorary Sponsors Council of the Planned Parenthood Federation's 1965 Nationwide Campaign.⁷¹

We submit the evidence is overwhelming that, at least as of 1965, the use of extrinsic aids to avoid conception, within the marital relation, cannot be held contrary to the prevailing morality of the community. The acceptance of such practices by general public opinion, by virtually the entire medical profession, by the bulk of religious groups, and by leading organizations and individuals, and especially the actual employment of such devices on a widespread scale by all levels of government itself — render any other conclusion impossible.

⁶⁸ Critical Issues Council, *Resources and the Future: Population* (Aug. 1964), p. 5.

⁶⁹ Adopted at 23d National Convention, Cleveland, Ohio, Apr. 24, 1964 (mimeo. release).

⁷⁰ For a listing of affiliates, see Planned Parenthood Federation, *Planned Parenthood Affiliates* (June 1964).

⁷¹ Planned Parenthood News, Fall 1964, p. 1.

Since there is no objective relation between the prohibition of the Connecticut statutes and any material public welfare; since, in other words, the Connecticut statutes rest solely on moral principles and are purely matters of religious or ethical faith; and since these principles do not reflect the dominant moral opinion of the community, the attempt by Connecticut to enforce them against the whole community by criminal statute cannot stand under the due process clause.

5. Any Possible Beneficial Aspects Of The Statute Are So Totally Outweighed By Their Cruel And Drastic Infractioⁿ Of Individual Rights, Their Inconsistencies And Irrationalities In Actual Operation, And Their Other Patent Defects, That They Must Be Held Arbitrary And Capricious And Hence In Violation Of Due Process Of Law.

Our final point under the due process clause is that, even if the statutes were found to satisfy the due process requirements just discussed, they must still pass the basic test of being not arbitrary or capricious. This involves a general weighing of benefits against detriments. We realize that in this balancing process the burden is on appellants to show that the statutes are arbitrary. For reasons already mentioned, however, the burden is lighter in this case because fundamental rights of personal liberty are at stake, and hence the Court has a greater obligation to scrutinize the legislative judgment with skepticism and care. Moreover, there is here no clear-cut expression of statutory purpose which can serve as any solid foundation for a presumption in favor of the legislative judgment. In any event we believe the facts demonstrate that these Connecticut statutes cut so deeply into so many facets of individual liberty, and are so totally irrational in their social impact, that the burden of proving them arbitrary and capricious, even by the most exacting standard, is fully met.

The benefits accruing to the State of Connecticut from the statutes in question, being derived from governmentally enforced adherence to moral principles, and not being subject to objective measurement, are difficult to weigh in a due process balance. Our main attention, then, is focused on the other side of the scales.

Some of the detrimental effects of the statutes have already been pointed out. Others are apparent. We confine our treatment to a summary of the principal points.

(a) The Choice Between Ill-Health Or Death, And Abstinence.

For many women, as we have seen, pregnancy means serious illness or death. The methods of avoiding pregnancy barred by the Connecticut statutes, while not yet faultless, are in the opinion of the medical profession, the safest, the most effective, and the best, and provide a satisfactory solution to the problem. The methods allowed by the Connecticut statutes are ineffective and dangerous, and do not afford a satisfactory solution, medical or otherwise. The women suffering from such conditions are therefore placed in the position of risking serious injury or loss of life or, through abstinence, sacrificing the right to enjoy one of the most cherished aspects of the marriage relationship.

This cruel dilemma enforced by the Connecticut statutes cannot be justified. The right to protect one's own health and life is obviously fundamental. The power of the state to prohibit any person from taking medical measures to safeguard life and health, if it exists at all, is surely very narrowly circumscribed. It can be exercised only in the most extreme situations and upon the plainest showing of social necessity. Apart from the power to conscript men of arms under the war power, it is difficult to envisage the circumstances where such governmental measures could conceivably be warranted. Cer-

tainly no instances come to mind where the state has prohibited an individual from preserving life and health through the use of medically accepted methods not harmful in themselves.

It is no answer to say that the individual has the alternative of abstinence. The conjugal right is itself fundamental, one of the most precious rights with which man is endowed. To condition the enjoyment of one elemental right upon the sacrifice of another, is not a choice the state may constitutionally impose. Whichever side of the coin one looks at, the lack of power in the state to deny liberty in this way remains.⁷²

We know of no case where this Court has dealt with these precise questions.* But in *Jacobson vs. Massachusetts*, 197 U.S. 11 (1905), this Court did at one point approach the problem. That case involved a Massachusetts statute providing for compulsory vaccination. The Court upheld the statute. In the course of his opinion, Justice Harlan addressed himself to the argument that there might be situations where it is "apparent or can be shown with reasonable certainty that [a person] is not at the time a fit subject of vaccination or that vaccination, by reason of his then condition, would seriously impair his health or probably cause his death." Justice Harlan was careful to make clear:

"We are not to be understood as holding that the statute was intended to be applied to such a case, or, if it was so intended, that the judiciary would not be competent to interfere and protect the health and life of the individual concerned." 197 U.S. at 39.

⁷² A third possibility, open in some circumstances, is sterilization or abortion. But these solutions, even if available, do not eliminate the dilemma but simply present it in a different form. See subsection g; *infra*.

The situation supposed by Justice Harlan, on a vastly augmented scale, is here presented by Connecticut's interpretation of its anti-contraceptive statutes. And this Court is now asked to "protect the health and life" of the many individuals concerned.

(b) Other Harms To The Individual.

Even where actual life or grave and immediate impairment of health is not at stake, the Connecticut statutes impose serious deprivations upon many married couples. The fear of unwanted pregnancy is emotionally disturbing; indeed, "it can produce the effect of a direct inhibition, particularly if it is obsessively exaggerated, as is often the case."⁷³ The spacing of children is important to the health of the mother; in the Guttmacher poll of 3,381 physicians, well over two-thirds fixed the desirable interval between the termination of one pregnancy and the beginning of the next at from 10 to 24 months.⁷⁴ The bearing of defective children is tragedy for all concerned, — parents, children and society. Many other aspects of health and happiness turn on effective control of conception.⁷⁵

Under the Connecticut statutes these problems can be solved only at the price of abstinence. Yet abstinence itself leads to unhappiness, tensions between husband and wife, extra-marital relations, and divorce.⁷⁶ Again the statutes impose an intolerable choice which the state has no power to demand.

⁷³ 2 Deutsch, *The Psychology of Women* (1945), p. 93.

⁷⁴ Guttmacher, *Conception Control and the Medical Profession*, 12 Human Fertility 1, 6 (1947).

⁷⁵ See subsection 3, *supra*, and brief of Planned Parenthood Federation, amicus curiae, Appendix B.

⁷⁶ See subsection 3, *supra*, and brief of Planned Parenthood Federation, amicus curiae, Appendix B.

(c) *The Right To Make Decisions On The Most Personal And Important Questions Of Married Life.*

By forbidding the safest and most effective methods of avoiding conception, and permitting only the most harmful and unreliable ones, the statutes make it hazardous or impossible for a married couple to make their own decisions on the most crucial aspects of their life together. The State of Connecticut is stepping in, through its criminal law, to prevent them from deciding whether to have children, how many to have, at what time to have them. These are decisive questions which affect not only life and health but relations between spouses, careers of husband and wife, the economic status of the family, the method and manner in which children are to be raised, and a host of other things. The planning of children is essential to the planning of one's entire way of life.

Except for the most imperative of reasons, the state has no right, in a free society, to arrogate to itself the decision on these vital matters. As this Court declared in *Meyer vs. Nebraska*, "the right of the individual to . . . marry, establish a home and bring up children" is a fundamental "liberty" assured by our Constitution. 262 U.S. at 399.

(d) *The Unwanted Child.*

We have dealt up to now mostly with the impact of the statutes upon the parents. But the children produced by virtue of the Connecticut statutes must be considered too. The plight of the unwanted child, and its social consequences, have been well stated by Dr. Karl Menninger:

"Far more important than the dramatic examples in which the hostility of a mother ruins the life of an unwanted child, are the more general effects of repressed maternal hatred. Where one child reacts to this with an acute mental illness, dozens of children react to it in more subtle

ways by developing self-protective barriers against the inner perception of being unwanted. This may show itself in a determined campaign or in a provocative program of attracting attention by offensive behavior and even criminal acts. Still more seriously it may show itself as a constant fear of other people or as a bitter prejudice against individuals or groups through deep-seated, easily evoked hatred for them. The rage of the southern poor white against the Negro suspected of some dereliction is referable to the hate he feels inwardly at having been himself, like the Negro, unwanted. The same is perhaps true in the case of Germans and Jews and in many other situations which give opportunity for the expression of hatred in the denial of the feeling of being rejected. The importance of this factor in the psychology of war is even greater, in my opinion, than the economic factor arising from the increase of population. This is why I say that from the purely scientific point of view, planned parenthood is an essential element in any program for increased mental health and for human peace and happiness. The unwanted child becomes the undesirable citizen, the willing cannon-fodder for wars of hate and prejudice. . . ."⁷⁷

We may assume that the Connecticut legislature, when it passed the Connecticut law, did not take into account these factors. But in any current appraisal of the law they weigh heavily against a finding of reasonableness.

⁷⁷ *Love Against Hate* (1942), p. 224. See also Coghill, *Emotional Maladjustments from Unplanned Parenthood*, 68 *Virginia Medical Monthly* 682 (1941); Jenkins, *The Significance of Maternal Rejection of Pregnancy for the Future Development of the Child*, in Rosen, *Therapeutic Abortion* (1954), p. 269.

(e) *The Invasion Of Privacy.*

The statutes undertake, on a pervasive scale, to regulate the most intimate relations of husband and wife. We discuss these features of the law at greater length in Point III. At this point we simply note, as one of the major costs that must be weighed against any possible gain, the unparalleled invasion of privacy which the law and its enforcement would entail.

(f) *Abridgment Of The Right To Practice Medicine In Accordance With Accepted Scientific Principles.*

As we have stressed throughout this brief, the Connecticut statutes run squarely counter to all accepted medical opinion and practice. They prohibit physicians from employing methods dictated by scientific knowledge. They require the use of practices which students and practitioners of medicine virtually unanimously condemn as unscientific and harmful; indeed use of such methods in other States might well in some cases render a physician guilty of malpractice. They hamper further inquiry and foreclose experimentation in new techniques for the solution of human and social problems. At the time the statutes were enacted the science of medicine had not reached the stage where the legislature could be aware of all these considerations, or at least of their full impact.⁷⁸ But they cannot be ignored now.

So far as the Connecticut statutes abridge freedom of expression, the power of the State is non-existent, or at best minimal. These issues are discussed in Point IV. We deal here with those aspects of the statutes which, restricting conduct that falls outside the area of expression and into the area of action, are governed by due process rather than First Amendment principles. We assume that the conduct of appellants in

⁷⁸ See Himes, *Medical History of Contraception* (1963), Part Five.

examining patients, prescribing drugs or instruments to avoid conception, and supplying those materials, is properly classified as action, subject only to due process protection.

Analysis of the problem quickly reveals, however, that the area with which we are concerned is closely analogous to the area of freedom of expression.⁷⁹ The pursuit of scientific knowledge frequently leads into the realms of experimentation or other conduct that may involve action. The line of division is hard to draw. Moreover, the values sought by the individual in undertaking scientific inquiry or practicing a scientific profession — fulfillment of the individual potentiality and achievement of a rewarding life — can often be attained only by pursuing one's endeavors into the field of scientific or social action. Such is the case here, both as to Dr. Buxton and Mrs. Griswold. These are values highly regarded by our society.

The same is true of the social values here at stake. Just as in the case of freedom of expression, society is vitally concerned with facilitating the process of orderly social change. In order to survive in the modern world it must, while maintaining the necessary stability, adapt itself to the revolutionary changes now taking place, at the peril of abrupt and catastrophic change. But social change requires more than the right of speech. It often requires a right of action. And such action is of no greater importance than in the field of scientific progress with which we are here dealing.

Finally, the area of action involved in this case is very similar to the area of expression for another reason. A basic rationale for not abridging freedom of expression is that expres-

⁷⁹ For discussion of the factors considered in the following paragraphs, as they apply to the area of freedom of expression, see Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877 (1963).

sion, in a broad sense, in itself results in no immediate or irreparable harm to any person. Society can therefore properly limit its controls to the ensuing action. The same characteristic is found in much conduct falling within the area classified as action, including the conduct of appellants and their patients in this case. There is no suggestion here that such action results in any immediate injury to any other person. The restrictions imposed by the State in this case, therefore, serve no social purpose. The power of the State may properly be limited to the prohibition of specific conduct where actual injury appears.

For all these reasons, we submit, the Court should weigh Connecticut's invasion of the right to practice medicine according to scientific principles by the strictest of standards, similar to those applied in free speech cases. This was the approach of the Court when the State of Nebraska attempted to forbid the teaching of German (*Meyer vs. Nebraska*, 262 U.S. 390), and when the State of Oregon sought to prevent the operation of private schools (*Pierce vs. Society of Sisters*, 268 U.S. 510). Applying these standards the Connecticut statutes must be judged arbitrary and capricious. They are the relic of another age, like the laws against the teaching of evolution, and bear no reasonable relation to modern times or needs.

(g) *Irrationality In Relation To Other Laws.*

Judged by the policy expressed in other Connecticut legislation, the restrictions imposed by the statutes involved in this case are wholly irrational:

Under the Connecticut abortion law a physician may abort a patient when "necessary to preserve her life or that of her unborn child." Conn. Gen. Stats., Sec. 53-29. So too, a woman may "produce upon herself miscarriage or abortion" where necessary for these same reasons. Conn. Gen. Stats., Sec. 53-30.

But under the anti-contraceptive statutes they are forbidden to take effective measures to prevent the conception, even though they know a later abortion will be necessary.

Under other Connecticut laws sterilization — an operation in which an "instrument" is used "for the purpose of preventing conception" — may be performed upon inmates of the State Prison or of State mental hospitals in certain medically prescribed situations, and also may be performed in other situations where that operation "is a medical necessity." Conn. Gen. Stats., Sec. 17-19 and 53-33. But less permanent measures for achieving the same purpose are not allowed.

Under the statutes applied to these appellants, contraceptives can be prescribed, sold or used for the prevention of disease (see Statement of the Case, *supra*), but not for the protection of life.

None of these distinctions makes sense, either in moral terms or in practical terms. If moral principles require that never, under any circumstances, can life be thwarted by extrinsic aids to avoid conception, how can the State justify the more serious denial of life by abortion or sterilization? And how can it justify the same thwarting of life in order to prevent the less serious results of venereal disease? The statutes challenged here are not the outcome of any exercise of rational judgment. They are, by the most elementary meaning, arbitrary and capricious.

(b) *Irrationalities In Operation.*

The Connecticut statutes operate in an irrational manner in at least four important respects:

(1) The statutes, so far as enforced, would always be applicable to married persons and seldom applicable to unmarried persons engaging in sexual relations. This paradox arises from the fact that, as just stated, it is not unlawful for persons

to use otherwise forbidden devices for the purpose of preventing disease although by so doing they also prevent conception. The Connecticut law requires a serological test and a certification that the parties are free from venereal disease before a marriage certificate can be obtained. Conn. Gen. Stats., Sec. 46-5(b). When married, presumably the parties are healthy in this respect and, if they are faithful to each other, will have no occasion to use contraceptives for the prevention of disease. Persons engaged in extra-marital intercourse cannot be expected to have the assurance of a physician's certificate that they will not risk infection. Consequently they may legally employ the devices forbidden to married couples.

(2) The statutes operate to discriminate against low-income groups. As this Court noted in *Poe vs. Ullman*, the statutes are a dead letter as applied to private individuals or private physicians. They are enforced, and effectively, against birth control clinics; no such clinics have operated in Connecticut since the *Nelson* decision in 1940. They would presumably also be enforced against quasi-public institutions such as hospitals if birth control information or materials were freely made available by them to the general public. The result is that those persons who can afford to go outside the State, or to consult a private physician (at least after *Poe vs. Ullman*), can obtain and use contraceptive devices. Those who cannot afford this course of action, or who do not have access to the necessary information through lack of education or otherwise, receive the brunt of the law's impact. The application of the statute is thus wholly arbitrary.

(3) Since the statutes are not generally enforced or enforceable, they can only be applied to individuals in an arbitrary fashion. No rational program for enforcement has been instituted or could be. The law is thus subject to the unfettered discretion of the prosecuting officials. It is open to use for

blackmail, or for paying off a grudge, or for harassment of an unpopular citizen. It is not capable of rational administration. See *Davis vs. Schnell*, 81 F. Supp. 872 (S.D. Ala., 1949), *aff'd* 338 U.S. 933 (1949); Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 Yale L.J. 543 (1960).

(4) The statutes tend to produce an increase in the number of illegal abortions. While the evidence is not conclusive, there are many authorities who find a direct relation between the availability of contraceptive services and the criminal abortion rate.⁸⁰ It stands to reason that the Connecticut statutes, which cut off all public information and services on contraception, operate to accentuate this acute social problem. The law thus promotes the very kind of immorality it ostensibly is designed to limit.

(i) *The Problem Of Overpopulation.*

Population expansion poses a momentous problem for this country and the world today. The issue must be ranked as equal in importance to the questions of disarmament and peace, automation, poverty and civil rights.⁸¹ Indeed population control is a part, and a significant part, of each of these burning problems.

⁸⁰ See, e.g., Kleegman, *Planned Parenthood: Its Influence on Public Health and Family Welfare*, in Rosen, *Therapeutic Abortion* (1954), pp. 254-5; Calderone, *Abortion in the United States* (1958), pp. 111-3, 182; Whelpton, *The Abortion Problem*, in Williams, *The Sanctity of Life and the Criminal Law* (1957), p. 211.

⁸¹ Note the statement of the National Academy of Sciences: "Other than the search for lasting peace, no problem is more urgent." *The Growth of World Population*, Publication No. 1091 of the National Academy of Sciences, National Research Council (Wash., D. C., 1963), p. 2.

We will not attempt to present in this brief the facts pertaining to the "population explosion." It is now fully apparent that the public welfare of the world, this nation, and all its constituent parts, requires immediate consideration of measures to plan and limit population growth. And any such program must obviously rely upon the use of scientific methods for preventing conception.

The Federal Government has recognized the problem and is actively seeking a solution. In December of 1962 United States policy was officially stated by Richard H. Gardner, Deputy Assistant Secretary of State for International Organization Affairs, speaking to the United Nations:

"In the opinion of my Government progress toward (the) high aims of the United Nations Charter cannot be measured merely by increases in gross national product. The object of economic development is the welfare and dignity of the individual human beings.

"If the condition of the individual, and not gross statistics, is to be the measure of our progress, then it is absolutely essential that we be concerned with population trends So long as we are concerned with the quality of life we have no choice but to be concerned with the quantity of life.

"We believe these statements are true not just for some but for all nations

"Within the United States our local, state and federal governments are all devoting attention to population trends as part of their planning for the improvement of individual welfare."⁸²

⁸² U.S. State Department Bulletin, Vol. XLVIII, No. 1228, Jan. 7, 1963.

President Kennedy supported these developments. Thus in a speech on June 5, 1963, calling for solution of the problem of hunger in the world, he made clear the interest of this country when he said, "Population increases have become a matter of serious concern."⁸³

And President Johnson, in a significant and much-noted passage in his State of the Union Address this year, emphasized that additional action was necessary and would be taken:

"I will seek new ways to use our knowledge to help deal with the explosion in world population and the growing scarcity of world resources."⁸⁴

We are confronted then with an acute world-wide problem that is pressing for immediate solution. That solution must involve, as a major element, the voluntary use of contraceptive devices to limit the number of children born. Viewed in this context, in the light of world opinion and world needs, the contrary judgment of the Connecticut statutes, left-overs from a by-gone era, can have little standing.

(j) *The Accumulation Of Factors,*

Possibly no one of the considerations set forth above would persuade the Court to hold the Connecticut statutes arbitrary and capricious. But the accumulated impact of all of them makes that conclusion irresistible.

⁸³ N.Y. Times, June 5, 1963.

⁸⁴ 111 Cong. Rec. 27 (daily ed., Jan. 4, 1965).

G. The Statutes, Considered As An Effort To Protect Public Morals By Discouraging Sexual Intercourse Outside The Marital Relation, Are Not Reasonably Designed To Achieve That End And Impose Restrictions On Fundamental Liberties Far Beyond What Is Necessary To Accomplish Such A Purpose.

We reach finally the last objective which has been advanced as a constitutional basis of the Connecticut statutes. The Supreme Court of Errors said in *State vs. Nelson* that "it is not for us to say that the Legislature might not reasonably hold . . . that use of contraceptives, and assistance therein or tending thereto, would be injurious to public morals; indeed, it is not precluded from considering that not all married people are immune from temptation or inclination to extra-marital indulgence, as to which risk of illegitimate pregnancy is a recognized deterrent deemed desirable in the interests of morality." 126 Conn. at 424, 11 A.2d at 861. And twice it has quoted the Massachusetts decision in *Commonwealth vs. Gardner*, 300 Mass. 372, 15 N.E.2d 222 (1938), that the use of contraceptives would "promote sexual immorality." 126 Conn. at 421, 11 A.2d at 860; *Tilston vs. Ullman*, 129 Conn. at 90, 26 A.2d at 585. We take it that the Supreme Court of Errors is saying that the statutes are constitutionally justified as measures to discourage extra-marital sexual relations of both married and unmarried persons.

Viewed in this way, the Connecticut statutes are designed to enforce moral principles. But in this situation the moral purpose may be objectively related to material public welfare and cannot be said to run clearly counter to the current moral standards of the community. Hence the objections founded on these grounds, as discussed in Section F, *supra*, are not applicable here.

Nevertheless, the statutes, scrutinized in light of the purpose now under consideration, violate due process in two major respects: (1) the means employed are not substantially and reasonably related to the objective sought; and (2) the statutes impose drastic restrictions upon individual rights far beyond what is necessary to achieve the stated purpose.

1. The Relation Of Means To End.

The means employed by the Connecticut statutes, ostensibly to discourage extra-marital relations, are to prohibit the use of contraceptive devices. The statutes do not regulate the sale, prescription, display, advertising or any other matters. Being directed solely at use, the statutes could accomplish their objective by simply prohibiting the use of such devices in extra-marital relations. Prohibition of use by married couples — the basis of this prosecution — has no relation whatever to the claimed objective. The situation is the same as if, in order to discourage adultery or fornication, Connecticut prohibited all sexual relations among its citizens.

Furthermore, in actual operation the statutes are enforceable *least of all* against those who use contraceptives in extra-marital relations. As already stated, contraceptive devices can be prescribed, sold and used in Connecticut for prevention of disease. And persons engaging in sexual relations outside the marriage status have a far better basis than married couples for asserting that the device was used for the prevention of disease. So too, those who engage in the sale and distribution of such items cannot be subjected to criminal penalties as accessories, since the State could not in any event prove that the person making the sale intended that the device be used for the prohibited purpose, prevention of conception, and not for the permissible purpose, the prevention of disease. With respect to the forbidden use of the articles in extra-marital relations, therefore, the task of the prosecutor is virtually impossible.

And, in fact, contraceptive devices are widely available for sale and use in Connecticut. The statutes, as this Court held in *Poe vs. Ullman*, have no effect upon individual users. Their only effect is on birth control clinics, whose services were not available to the unmarried.

In short, there is no substantial relation, in theory or in practice, between prohibiting the use of contraceptives within the marital relation and the discouragement of sexual relations outside the marriage bond.

2. The Breadth Of The Statutes.

Even if some relation were shown between means and end, the statutes are not narrowly drafted to accomplish their purpose, but sweep within their ambit much other conduct which is not appropriate to their purpose and which the State may not control. The manner in which the statutes infringe upon protected liberties has been discussed in Section F, *supra*, and need not be repeated here. The right to life and health, the right to make the fundamental decisions of married life, the right to privacy, the right to practice one's profession, are all drastically curtailed or denied. And the excessive breadth of the statutes is responsible for many of the inconsistencies and irrationalities that have been pointed out.

Nor is it necessary that the statutes sweep so broadly to achieve this aim of discouraging extra-marital relations. Alternatives are available. Connecticut has statutes against adultery, fornication and lascivious carriage. Conn. Gen. Stats., Sec. 53-218 and 53-219. Some regulation of sale or prescription of contraceptive devices, designed to keep them out of the hands of those seeking illicit sexual relations, is possible. Other States deal with the problem this way.

This case falls squarely within the doctrine of those decisions which have struck down legislation that was not narrowly

drafted to meet the specific evil. *Wieman vs. Updegraff*, 344 U.S. 183 (1952); *Shelton vs. Tucker*, 364 U.S. 479 (1960); *Aptheker vs. Secretary of State*, 378 U.S. 500 (1964). What the Court said in *Butler vs. Michigan*, 352 U.S. 380 (1957) — a strikingly similar case — is fully applicable here:

"The State insists that, by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. Surely, this is to burn the house to roast the pig." 352 U.S. at 383.

H. Conclusion

Whatever we take to be the objective of the Connecticut statutes, they do not meet the standards of due process. Seldom has the Court had before it legislation for which the purposes were so obscure or the alleged benefits so ill-founded. And probably never has the Court had before it legislation which touched so drastically and so arbitrarily upon so many fundamental rights of the citizen. Fortunately the law is aberrational. Only Connecticut, and in part Massachusetts, have such legislation. We submit it cannot stand the test of due process of law.

POINT III.

The Connecticut Anti-Contraceptive Statutes Violate Due Process Of Law In That They Constitute An Unwarranted Invasion Of Privacy.

The concept of limited government has always included the idea that governmental powers stopped short of certain intrusions into the personal and intimate life of the citizen. This is indeed one of the basic distinctions between absolute and limited government. Ultimate and pervasive control of the individual, in all aspects of his life, is the hallmark of the absolute state. A system of limited government safeguards a private sector, which belongs to the individual, and firmly distinguishes it from the public sector, which the state can control.

Protection of this private sector — protection in other words of the dignity and integrity of the individual — has become increasingly important as modern society has developed. All the forces of a technological age — industrialization, urbanization, organization — operate to narrow the area of privacy and facilitate intrusions into it. In modern terms, the capacity to maintain and support this enclave of private life marks the difference between a democratic and a totalitarian society.

In our constitutional system, the principle of safeguarding the private sector of the citizen's life has always been a vital element. The Constitution nowhere refers to a right of privacy in express terms. But various provisions of the Constitution embody separate aspects of it. And the demands of modern life require that the composite of these specific protections be accorded the status of a recognized constitutional right.

The protected area of privacy is marked out in part by the First Amendment. Freedom of religion is a key element in any

system for maintaining the independence and the dignity of the individual. So also is the right to hold beliefs and opinions without coercion from the state. This is the meaning of Justice Jackson's famous declaration that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia State Board of Education vs. Barnette*, 319 U.S. 624, 642 (1943).

Another constitutional provision which recognizes the right of privacy is the Third Amendment. This forbids that any soldier "shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law." At the time the Constitution was framed, this invasion of privacy was one of the chief dangers threatening the personal life of the citizen.

Undoubtedly the most significant constitutional provision directed toward protection of privacy is the Fourth Amendment. This expressly guarantees the "right of the people to be secure in their persons, houses, papers, and effects." The protection is phrased in terms of search and seizure, and arrest, because those were the chief manifestations of invasion of privacy under conditions existing when the Bill of Rights was adopted. But the concept which the Fourth Amendment undertakes to incorporate in our system of individual rights is certainly a much broader one. It embodies the ancient notion that "a man's home is his castle." And applied to conditions of modern life, as Justice Bradley declared in *Boyd vs. United States*:

"The principles laid down in this opinion [*Entick vs. Carrington*] affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's

home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence, — it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment," 116 U.S. 616, 630 (1855).

Another classic expression of this view that the Fourth Amendment incorporates a comprehensive protection of the right to privacy is that of Justice Brandeis, dissenting in *Olmstead vs. United States*:

"The protection guaranteed by the [Fourth and Fifth] Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. . . ." 277 U.S. 438, 478 (1928).

And only recently this Court took occasion to refer to the "right-to privacy, no less important than any other right care-

fully and particularly reserved to the people." *Mapp vs. Ohio*, 367 U.S. 643, 656 (1961).¹

Closely related to the Fourth Amendment is the Fifth Amendment. This established by constitutional mandate an accusatorial rather than an inquisitorial system of criminal prosecution. And in its broader reaches it protects the conscience and dignity of the individual from all outside forces, whether the government or the general public.²

In short, just as the First Amendment, though referring concretely to speech, press, assembly and petition, protects a general right of expression and association (see *N.A.A.C.P. vs. Button*, 371 U.S. 415 (1963)), so the Third, Fourth and Fifth Amendments, while specifically mentioning only the major forms of invading privacy which were paramount at the time, embody a general principle which protects the private sector of life against "every unjustifiable intrusion by the Government."

It can be argued, further, that the right of privacy is protected by the Ninth Amendment. The framers there provided that "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Professor Redlich in an important article has pointed out that in interpreting both the Ninth and Tenth Amendments, "the textual standard should be the entire Constitution." "The original Constitution," he wrote, "and its amendments project through the ages the image of a free and open society. The Ninth and Tenth Amendments recognized — at the very outset of our national experience — that is was

¹ See also *McNroe vs. Pape*, 365 U.S. 167 (1961). For a discussion of the significance of the Fourth Amendment cases, see Beane, *The Constitutional Right to Privacy in the Supreme Court*, 1962 Sup. Ct. Rev. 212.

² See, e.g., Griswold, *The Right to be Let Alone*, 55 N.W.U.L. Rev. 216 (1960).

impossible to fill in every detail of this image. For that reason certain rights were reserved to the people. The language and history of the two amendments indicate that the rights reserved were to be of a nature comparable to the rights enumerated." Redlich, *Are There "Certain Rights" Retained by the People?* 37 N.Y.U.L. Rev. 787, 810 (1962).

The Ninth Amendment was certainly intended to protect some rights of the people. As Dean Griswold has said, "The right to be let alone' is the underlying theme of the Bill of Rights."³ It is submitted that the interest of married spouses in the sanctity and privacy of their marital relations, involves precisely the kind of right which the Ninth Amendment was intended to secure.

Finally, protection against unwarranted intrusion by the government into private affairs is incorporated in the "liberty" guaranteed by the due process clause of the Fourteenth Amendment. That provision, as this Court has ruled, applies to the States the guarantees embodied in the First, Fourth and Fifth Amendments. *Gitlow vs. New York*, 268 U.S. 652 (1925); *Mapp vs. Ohio*, 367 U.S. 643 (1961); *Malloy vs. Hogan*, 378 U.S. 1 (1964). Further, the Court has specifically held that the due process clause of the Fourteenth Amendment embraces certain additional aspects of liberty not necessarily included in one of the specific provisions of the Bill of Rights. Such was the holding in *Rochin vs. California*, 342 U.S. 165 (1952). There police officers broke into defendant's bedroom where he was sitting partly dressed on his bed, upon which his wife was lying. They seized him and, by use of a stomach pump, extracted certain capsules which he had swallowed. This invasion of privacy was held, not a violation of the Fourth or Fifth Amendments, but a violation of due process in that it

³ *Id.* at 217.

was inconsistent with the "respect for those personal immunities which . . . are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" 342 U.S. at 169.

It is true that the *Rochin* case involved intrusion upon privacy through physical violence. See *Irvine vs. California*, 347 U.S. 128 (1954). Yet the insistent development of the law has been to extend legal protection against harms to the person from physical to non-physical injuries. And there is no sound reason, especially under modern conditions of living, to withhold constitutional protection in those cases where the invasion of privacy, even though not achieved by physical means, is inconsistent with preserving the private sector of living against unwarranted infringement. As Mr. Justice Harlan said in *Poe vs. Ullman*, "It would surely be an extreme instance of sacrificing substance to form were it to be held that the Constitutional principle of privacy against arbitrary official intrusion comprehends only physical invasions by the police." 367 U.S. at 551. Indeed, in *Public Utilities Commission vs. Pollak*, 343 U.S. 451 (1952), although it did not there uphold the claim, the Court recognized that the liberty guaranteed by the due process clause embraced invasion of privacy by non-violent means.⁴

It should be noted that the development of the right of privacy in constitutional law has been paralleled by the growth of the right of privacy in tort law. Such a right is now recognized

⁴ The case in which a constitutional right of privacy has so far been most explicitly recognized and sustained, is *York vs. Story*, 324 F.2d 450 (C.A. 9, 1963). In that case it was alleged that police officers took photographs of a woman complainant in the nude and distributed them among their fellow officers. The Court held that a cause of action was stated under 42 U.S.G.A. Sec. 1983 for depriving plaintiff of "rights . . . secured by the Constitution," specifically the right of privacy. See also Judge Washington, dissenting in *Silverman vs. U.S.*, 275 F.2d 173, 178 (C.A.D.C., 1960).

in most States, by judicial decision or legislation. As Harper and James have said: "Viewing this extraordinary development with the omniscience of hindsight, it appears that the inception of the doctrine was the almost inevitable development of the law under the pressure of great social need, produced by the technological developments and the vast extension of business which transformed American society into mass urbanization thus creating many new sensitivities."⁵ The same needs which have led to the protection of privacy from non-governmental sources, even more urgently press for protection of that basic right from governmental invasion.

If, then, we accept the proposition that the Constitution affords protection to the right of privacy, the question becomes what standards are to be employed to delimit the area thus safeguarded. Such standards have not, of course, been fully worked out. Concededly the problem is a difficult one. Yet surely it is susceptible to resolution by normal judicial techniques, as the experience of the courts in the torts field attests. The issue must turn, as do other problems of interpreting the Bill of Rights, upon the fundamental ends sought by the constitutional guarantees, considered in the light of modern conditions and needs.

When we look at the legal development of the right of privacy, from earliest times to the present, two major elements stand out. What the law has most basically sought to protect, and what has in fact been brought within the concept, are (1) maintaining the sanctity of the home; and (2) preserving from outside intrusion the intimacies of the sexual relationship in marriage.

⁵ 1 Harper and James, *The Law of Torts* (1956), p. 683. See also Prosser, *Privacy*, 48 Calif. L. Rev. 383 (1960).

The reasons are not far to seek. The home is the ultimate refuge, of every person high or low, from the outside world. It is the one chief tangible base, especially now that geographical escape to the frontier is foreclosed, for seeking seclusion. And, of all relations with other people, marital relations are the most private, the most sought to be sheltered from the public gaze. In these two realms "the right to be let alone" becomes most meaningful and most precious.

Hence it is not surprising that the Third Amendment expressly deals with the quartering of outsiders "in any house," and that the Fourth Amendment protects the "right of the people to be secure in their . . . houses." At common law, and presently under legislation, invasion of the home is afforded greater protection than invasion of the person; search of a house requires a warrant whereas an arrest can be made on reasonable grounds to believe a crime has been committed. See Barrett, *Personal Rights, Property Rights, and the Fourth Amendment*, 1960 Sup. Ct. Rev. 46. Decisions of this Court under the Fourth Amendment have recognized the special significance attached to invasion of the home. Compare *Goldman vs. United States*, 316 U.S. 129 (1942), with *Silverman vs. United States*, 365 U.S. 505 (1961). In *Rochin* the "illegally breaking into the privacy of petitioner" in his bedroom was a major factor in finding a violation of due process. 342 U.S. at 172. See also *Monroe vs. Pape*, 365 U.S. 167 (1961); and compare *Public Utilities Commission vs. Pollak*, 343 U.S. 451 (1952); *Lanza vs. New York*, 370 U.S. 139 (1962). And the development of the right of privacy in tort law began with protecting the seclusion of the plaintiff in his house or on his land. See 1 Harper and James, *The Law of Torts* (1956), pp. 678-9.

The personal aspects of the marital relationship have likewise been consistently recognized as entitled to protection under the right of privacy. This factor was also present in *Rochin*

vs. *California* and in *Monroe vs. Pape* (*supra*). Intrusion into this area, like invasion of the home, constituted the starting point in the growth of the right to privacy in tort law. See *Harper and James, supra*. Laws prohibiting the disclosure of the names of victims of sex crimes reflect the same concern. And at an earlier phase in the litigation over the statutes here at bar the Connecticut Supreme Court of Errors acknowledged the exceptional nature of this aspect of privacy by permitting the married couples involved to sue under fictitious names. *Buxton vs. Ullman*, 147 Conn. at 59-60, 156 A.2d at 514-5.

In reason, tradition and current practice, therefore, these two areas — the sanctity of the home and the wholly personal nature of marital relations — have been recognized as forming the inner core of the right of privacy. Whatever else that constitutional right may encompass, it surely includes protection for these aspects of the private sector of life.

The case now before the Court combines both of these critical elements in the right to privacy. The hand of the government reaches not only into the home but into the bedroom. The statutes are directed not at regulation of sale, prescription or advertising, but at *use*. Enforcement of the statute would entail search warrants to discover "instruments" of crime in the bathroom closet. Testimony of close friends or servants in the home would be required.

It is hardly necessary to detail these aspects of the case in this brief. Both Justices who reached the merits in *Poe vs. Ullman* were struck by the shocking invasion of privacy inherent in the Connecticut statutes, and said all that needs to be said on this score. Mr. Justice Douglas observed:

"The regulation as applied in this case touches the relationship between man and wife. It reaches into the intimacies of the marriage relationship. If we imagine a

regime of full enforcement of the law in the manner of an Anthony Comstock, we would reach the point where search warrants issued and officers appeared in bedrooms to find out what went on. It is said that this is not the case. And so it is not. But when the State makes 'use' a crime and applies the criminal sanction to man and wife, the State has entered the innermost sanctum of the home. If it can make this law, it can enforce it. And proof of its violation necessarily involves an inquiry into the relations between man and wife.

"That is an invasion of the privacy that is implicit in a free society." 367 U.S. at 519-21.

And Mr. Justice Harlan summed it up in the following terms:

"Precisely what is involved here is this: the State is asserting the right to enforce its moral judgment by intruding upon the most intimate details of the marital relation with the full power of the criminal law. Potentially, this could allow the deployment of all the incidental machinery of the criminal law, arrests, searches and seizures; inevitably, it must mean at the very least the lodging of criminal charges, a public trial, and testimony as to the *corpus delicti*. Nor could any imaginable elaboration of presumptions, testimonial privileges, or other safeguards, alleviate the necessity for testimony as to the mode and manner of the married couples' sexual relations, or at least the opportunity for the accused to make denial of the charges. In sum, the statute allows the State to enquire into, prove and punish married people for the private use of their marital intimacy." 367 U.S. at 548.

It is no answer to say that the statutes have not been enforced in this way. The vice is that they can be. As long as the statutes are on the books the fundamental rights of privacy of married couples in Connecticut are threatened.

Nor is it an answer to say that other statutes, dealing with fornication, adultery, homosexuality and the like, raise the same issues of privacy. We are not concerned with those statutes here. In any event Mr. Justice Harlan disposed of the argument in *Poe vs. Ullman* when he said:

"Adultery, homosexuality and the like are sexual intimacies which the State forbids altogether, but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected. It is one thing when the State exerts its power either to forbid extramarital sexuality altogether, or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy." 367 U.S. at 553.

We need only add that, as discussed in Point II, no compelling reasons of State policy justify the invasion of the constitutional right of privacy brought about by these statutes. Indeed, our analysis of the objectives sought by the legislation reveals that no material benefits whatever, but only positive harms, flow from this legislation. We submit that it would be hard to find a more far-reaching invasion of the private sector of life than this case discloses.

POINT IV.

The Connecticut Statutes, On Their Face And As Applied In This Case, Violate The First And Fourteenth Amendments In That They Abridge Freedom Of Speech.

A.

Section 54-196 applies to any person "who assists, abets, *counsels*, causes, hires or commands another to commit any offense." As the statute is worded, and as the Connecticut Supreme Court of Errors has interpreted it, the mere "counseling" is sufficient to establish the offense. Thus in the leading case of *State vs. Scott*, 80 Conn. 317, 68 A. 258 (1907), the Court, in defining the rule for criminal liability of an accessory, stated:

"Every one is a party to an offense who . . . does some act which forms part of the offense, or assists in the actual commission of the offense or of any act which forms a part thereof, *or directly or indirectly counsels* or procures any person to commit the offense or do any act forming a part thereof." 80 Conn. at 323, 68 A. at 260. (*Italics added*).

The Supreme Court of Errors reiterated this position in a subsequent key decision on the statute, saying that the offense was established if "the defendant procured, *counseled or encouraged* [another] to do it," " . . . that she knowingly abetted, *counseled or encouraged* [the other] in his guilty purpose." *State vs. Wakefield*, 88 Conn. 164, 167, 173, 90 A. 230, 231, 233 (1914). (*Italics added*).

Consequently Section 54-196, combined with Section 53-32 (the use statute), would apply to a mother who advises her newly married daughter to use contraceptives in order to avoid pregnancy during a period of ill-health. It would apply to a physician who, without making the materials available or taking other action, advises a patient on the harmless or deleter-

ious qualities of a new contraceptive pill. It might apply to a faculty member of a medical school who instructs his students on the medical techniques of contraception. It might also make it a crime for an organization concerned with planned parenthood to publish a pamphlet urging the use of contraceptives for family planning. It would apply to a minister of the Congregational Church in Connecticut who counsels his parishioners that proper family planning is a religious obligation and that contraceptive devices are the best and most effective means of fulfilling this duty.¹

These applications of the statute violate the First Amendment's guarantee against abridgement of freedom of speech. Such cases are clearly governed by the doctrine laid down by this Court in *Kingsley Pictures Corp. vs. Regents*, 360 U.S. 684 (1959). In that case the Court held unconstitutional under the First Amendment New York's ban on the film "Lady Chatterley's Lover." The State had argued that it could constitutionally forbid the advocacy of conduct — in this case, adultery — which it could validly make a crime. The Court, speaking through Mr. Justice Stewart, said:

"Its [the First Amendment's] guarantee is not confined to the expression of ideas that are conventional or shared by the majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax." 360 U.S. at 689.²

¹ See the resolution of the Connecticut Conference of Congregational Churches approving the "proper use of medically approved contraceptives that may contribute to the spiritual, emotional and economic welfare of the family," quoted in Point II, Section F, subsection 4, *supra*.

² Furthermore, in so far as the statutes operate to prevent the obtaining of medical advice, the case is similar to *N.A.A.C.P. vs. Button*, 371 U.S. 415 (1963), and *Brotherhood of R.R. Trainmen vs. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964).

It is no answer to say that the Connecticut courts would not attempt to apply the statutes to counseling of this nature. We do not know. Such an application of the statutes would be no more extreme than that sanctioned in *Tileston vs. Ullman*, 129 Conn. 84, 26 A.2d 582, or *Buxton vs. Ullman*, 147 Conn. 48, 156 A.2d 508.

In any event, the very breadth and ambiguity of statutory prohibition against "counseling" operate to abridge freedom of speech. Persons apparently or possibly covered by its broad scope could not be certain what was prohibited and what was permitted. This kind of inhibiting effect upon the right to freedom of expression must fall under the repeated decisions of this Court in cases such as *Winters vs. New York*, 333 U.S. 507 (1948); *Burstyn vs. Wilson*, 343 U.S. 495 (1952); *Louisiana ex rel. Gremillion vs. N.A.A.C.P.*, 366 U.S. 293 (1961); *Cramp vs. Board of Public Instruction*, 368 U.S. 278 (1961); *N.A.A.C.P. vs. Alabama ex rel. Flowers*, 377 U.S. 288 (1964); *Baggett vs. Bullitt*, 377 U.S. 360 (1964).

We conclude, therefore, that the statute is invalid on its face.

B.

The application of the statutes to appellants in this case likewise abridged their rights to freedom of speech. In reaching its judgment that appellants were guilty of violating Sections 53-32 and 54-196 the trial court at many points relied upon conduct which was strictly speech and protected by the First Amendment. We do not contend that such conduct as examining patients, prescribing contraceptive devices, or furnishing patients with contraceptive materials constituted expression within the terms of the First Amendment. But other conduct, used as a basis for the finding of guilt, was exclusively speech.

The trial court included in its findings of fact, and hence as relevant to conviction, the following items of protected speech:

(1) The Center was opened "*to provide information, instruction and medical advice* to married persons as to the means of preventing conception and to *educate married persons* generally as to such means and methods." (R. 17).

(2) "The Center made such *information, instruction, education and medical advice* available to married persons . . ." (R. 17).

(3) Defendant Buxton gave "contraceptive *advice* to patients at the Center . . ." (R. 18).

(4) ". . . the patient attended a *group orientation session* with other patients at which all the methods of contraception available at the Center were described. . ." (R. 19).

(5) ". . . there were periods of time during which the patient . . . sat in the waiting room where there were *various pieces of literature*, including certain exhibits in evidence . . . available to her and which were *examined and read* by some of the patients of the Center." (R. 19).

(6) Defendant Griswold on several occasions "conducted the *group orientation session* . . ." (R. 20).

The trial court also included in its conclusions of law the following items:

(1) The three married women who testified concerning the use of contraceptives "sought and obtained *instruction and medical advice and counsel* as to methods of contraception . . ." at the Center. (R. 23).

(2) "The actions of the defendants in supervising and participating in the operation of this Center . . . constituted assisting, abetting, *counselling*, causing and commanding these women to commit a violation of the Statute . . ." (R. 23).

(3) "The actions of the defendant Estelle T. Griswold . . . in *delivering orientation lectures* describing the various methods of contraception available at the Center . . . constituted as-

sisting, abetting, *counselling*, causing and commanding two married women . . . to use drugs, medicinal articles and instruments for the purpose of preventing conception, in violation of said Sections 53-32 and 54-196 . . ." (R. 24).

(4) "The actions of the defendant C. Lee Buxton, a doctor, in giving . . . a married woman, a pelvic examination and in *approving* her choice of the orthogynol jelly . . . constituted assisting, abetting, *counselling*, causing and commanding [said woman] to use a drug or medicinal article for the purpose of preventing conception, in violation of said Sections 53-32 and 54-196 . . ." (R. 24).

The findings and conclusions are thus a grab bag of protected speech, and action not protected by the First Amendment. This failure to separate speech from action, and to make certain that only action formed the basis of the conviction, constitutes a violation of the First Amendment. The issue is controlled by the doctrine first clearly enunciated in *De Jonge vs. Oregon*, 299 U.S. 353 (1937). In that case the Court was asked to uphold the conviction of a member of the Communist Party who had presided at a meeting devoted to protests against police brutality in a labor dispute. The Court proceeded upon the assumption that the Communist Party had elsewhere engaged in illegal acts in violation of the State law. But Chief Justice Hughes ruled that the State power extended only to punishment of specific evils and could not prevent the associational expression of holding a peaceful meeting. He stated the principle in the following terms:

"These rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed." 299 U.S. at 364-5.

A similar admixture of speech and action also resulted in the invalidation of the conviction in *Thomas vs. Collins*, 323 U.S. 516 (1945). The Court has applied the same rule in other First Amendment cases, most particularly in *Gibson vs. Florida Legislative Investigation Commission*, 372 U.S. 539 (1963), and *N.A.A.C.P. vs. Alabama ex rel. Flowers*, 377 U.S. 288 (1964).

It is vital to any effective protection of freedom of speech that the courts insist upon maintaining this fundamental distinction between speech and action, and not permit the government to encroach upon the area of speech under the guise of controlling action. The Connecticut courts have not adhered to this principle in the case at bar.

Viewed realistically, the application of the anti-contraceptive statutes to these appellants is primarily an effort by the State of Connecticut to prevent information on birth control from reaching the public. As this Court found in *Poe vs. Ullman*, Connecticut has not in practice enforced the statutes against individual users or against physicians prescribing contraceptives to private patients. But it does enforce them against an association seeking to make the same information available to the general public. In a very real sense, the action of the State contravenes the basic purposes of the First Amendment. As this Court said in *Thornhill vs. Alabama*:

"Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." 310 U.S. 88, 101-2 (1940).

For these reasons, we submit, the statutes are void on their face and as applied to these appellants, being squarely in conflict with the letter and spirit of the First Amendment.

CONCLUSION

Appellants contend that these Connecticut statutes, on their face and as applied, violate the due process clause of the Fourteenth Amendment in that they are not reasonably related to a legitimate legislative purpose, and are otherwise unreasonable, arbitrary and capricious; that they violate the same provision in that they constitute an unjustified invasion of privacy; and that they violate the First Amendment as incorporated in the Fourteenth Amendment. Appellants respectfully urge this Court to reverse the decision below.

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In the
Supreme Court of the United States

OCTOBER TERM, 1964

No. 496

ESTELLE T. GRISWOLD

AND

C. LEE BUXTON,
Appellants,

vs.

STATE OF CONNECTICUT
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF ERRORS OF CONNECTICUT

BRIEF FOR APPELLEE

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**In the
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ESTELLE T. GRISWOLD

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**C. LEE BUXTON,
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vs.

**STATE OF CONNECTICUT,
*Appellee.***

**ON APPEAL FROM THE SUPREME COURT
OF ERRORS OF CONNECTICUT**

BRIEF FOR APPELLEE

OPINIONS BELOW

The opinion of the Supreme Court of Errors of Connecticut is reported in 151 Conn. 544, 200 A.2d 479. It is reprinted in the record at pages 61-63.

The opinion of the Appellate Division of the Circuit Court of Connecticut is reported in 3 Conn. Cir. 6. It is reprinted in the record at pages 40-50.

JURISDICTION

On November 10, 1961 a warrant was issued charging that the appellant C. Lee Buxton, a duly qualified and licensed

physician, and appellant Estelle T. Griswold "in violation of the provisions of Section 53-32 and 54-196 of the General Statutes of Connecticut, did assist, abet, counsel, cause and command certain married women to use a drug, medicinal article and instrument, for the purpose of preventing conception." (R. 1, 7) The appellants were arrested on the same date and on November 24, 1961 the appellants demurred to the informations on the grounds that as the cited statutes would be applied to the appellants they would be unconstitutional in that they would deny the appellants' rights to liberty and property without due process of law in violation of the 14th Amendment to the Constitution of the United States and that they would deny them their rights to freedom of speech and communication of ideas under the 1st and 14th Amendments to the Constiution of the United States. (R. 2, 8)

The demurrers were overruled. (R. 3-6, 9-12) On January 2, 1962, the appellants, after trial to the Court, were found guilty and sentenced to pay a fine of \$100 each. (R. 13)

On January 10, 1962 after stipulation of the parties the Court entered an order for joint appeals. (R. 14-15)

Appellants filed an assignment of errors (R. 33-37) and an appeal was taken to the Appellate Division of the Circuit Court which affirmed the judgment of the Circuit Court, 6th Circuit in an opinion rendered January 7, 1963. (R. 40-50)

The Appellate Division certified two questions to the Supreme Court of Errors of Connecticut. (R. 49-50)

On January 31, 1963 appellants petitioned for certification of additional question which was granted on February 19, 1963. (R. 52-60). On April 28, 1964, the Supreme Court of Errors affirmed the judgment of the Circuit Court. (R. 61-65). Execution was ordered stayed on May 20, 1964 and on July 22,

1964 a motion of Appeal to the Supreme Court of the United States was filed with the Supreme Court of Errors of Connecticut. (R. 65-66).

On December 7, 1964, this Court noted probable jurisdiction. (R. 67).

This Court has jurisdiction under 28 U.S.C. 1257 (3). *Mergenthaler Linotype Co. v. Davis*, 251 U.S. 256, 259 (1919)

STATUTES INVOLVED

Statutes involved in this case are Sections 53-32 and 54-196, General Statutes of Connecticut, Revision of 1958.

Said statutes are quoted in Brief for Appellants, page 3. They will also be found set out in the Record, page 50.

QUESTIONS PRESENTED

Where the appellants served as director (Estelle T. Griswold) and medical director (C. Lee Buxton) of a center to which married women came to obtain contraceptives and instructions as to their use to prevent pregnancy and where such married women received such contraceptive articles and instructions (in some cases from the appellants themselves) did Section 53-32, General Statutes of Connecticut, Revision of 1958 in connection with Section 54-196 of said statutes: 1) deny the appellants their rights to liberty and property in violation of the Fourteenth Amendment to the Constitution of the United States? 2) deny these appellants their rights to freedom of speech and communication of ideas under the First and Fourteenth Amendments to the Constitution of the United States?

STATEMENT OF THE CASE

The Planned Parenthood Center of New Haven, hereinafter referred to as the Center, was opened on November 1, 1961 to provide information, instruction and medical advice to married persons as to the means and methods of preventing conception and to educate married persons generally as to such means and methods (Finding, Par. 1, R. p. 16,17). The Center was located at 79 Trumbull Street in New Haven (Finding, Par. 2. R. p. 17). The Center operated from November 1, 1961 to November 10, 1961. (Finding, Par. 3, R. p. 17). The Planned Parenthood League of Connecticut also occupied an office on the second floor of the same building (Finding Par. 4, R. p. 17).

The defendant Estelle T. Griswold held the salaried office of executive director of the League (Finding, Par. 5, R. p. 17). She was also the Acting Director of the Center and in charge of the Administration and the educational program, both before the Center opened and during its time of operation (Finding, Pats. 6, 11, R. pp. 17,18)

The defendant C. Lee Buxton is a physician licensed to practice in the State of Connecticut (Finding, Par. 7, R. p. 17). He was the medical director of the Center both before its opening and while it was in operation. (Finding, Par. 8 R. p. 17). As such medical director and after consultation with the Medical Advisory Committee of the Center which committee was appointed by him, the defendant C. Lee Buxton made all medical decisions as to the facilities of the Center, including the types of contraceptive advice available and provided at the Center, the types of contraceptive articles and materials available at the Center for distribution to patients, and the methods of providing the same (Finding, Par 9, R. p. 18). In addition, the defendant C. Lee Buxton on several occasions examined and

gave contraceptive advice to patients at the Center, while it was in operation from November 1 to November 10, 1961 (Finding, Par. 10, R. p. 18).

The defendant Estelle T. Griswold on several occasions between November 1 and November 10, 1961, while the Center was in operation, interviewed persons prior to giving them appointments at the Center; took case histories; conducted the group orientation session, describing the various methods of contraception available at the Center; and gave a woman a drug or medicinal article to prevent conception (Finding, Par. 13, R. p. 20).

Joan B. Forsberg, a housewife and mother of three children living with her family in New Haven, Connecticut, upon learning of the existence of the Center, arranged for an appointment at the Center which was made for November 8, 1961, and on that date she went to the Center seeking contraceptive advice (Finding, Par. 14, R. p. 20). She gave a history to a receptionist, attended an orientation session at which the defendant Estelle T. Griswold instructed her and other women as to the various methods of contraception available at the Center, and told her and the other women that they could choose the method they would individually prefer and be furnished with the necessary materials if the doctor approved, was given a pelvic examination by a staff doctor, was told by the staff doctor that the anti-ovulation pill method of contraception which she had chosen was all right for her to use, was instructed by the doctor in its use, was thereafter given a supply of sixty anti-ovulation pills (State's Exhibit K) by the person on duty at the registration desk at the direction of the defendant Estelle T. Griswold, and before leaving paid a fee to the Center and was told to return to the Center in two months (Finding, Par. 14, R. p. 20). After her visit to the Center, Mrs. Forsberg used approximately thirty of these pills (State's Exhibit K) furnished her at the

Center for the purpose of preventing conception and the use thereof did prevent conception (Finding, Par. 15, R. p. 20).

On November 7, 1961, Marie Wilson Tindall, a housewife and mother, living in New Haven, Connecticut, having made an appointment, went to the Center seeking contraceptive advise (Finding, Par. 16, R. pp. 20,21). She had a history taken by the receptionist, attended an orientation session with other women at which time were described the various types of contraceptives available at the Center, was given a pelvic examination by a staff doctor, told the doctor that she had chosen a diaphragm as the type of contraceptive she wished to use, was fitted and given by the doctor a diaphragm and accompanying articles (State's Exhibits M through P), and thereafter was instructed in how to use them, and before leaving paid a fee of \$7.50 to the Center (Finding, Par. 16, R. pp. 20, 21). After her visit to the Center, Mrs. Tindall used the diaphragm and other articles (State's Exhibits M through P) furnished to her at the Center for the purpose of preventing conception (Finding, Par. 17, R. p. 21).

On November 9, 1961, Rosemary Anne Stevens, married almost a year and living with her husband in New Haven, Connecticut, having made an appointment, went to the Center seeking to obtain contraceptive advice additional to that previously attained (Finding, Par. 18, R. p. 21). While at the Center Mrs. Stevens had her history taken by the defendant Estelle T. Griswold, attended an orientation session at which the defendant Estelle T. Griswold described the methods of contraception available at the Center, was given a pelvic examination by the defendant C. Lee Buxton acting as staff doctor on that day at the Center, was advised by the defendant C. Lee Buxton that the method of contraception (ortho-gynol contraceptive jelly) which she had chosen was satisfactory to her, was given instruction by him as to its use, and before leaving

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the Center was given a tube of orthogynol vaginal jelly (State's Exhibit L) by the defendant Estelle T. Griswold and paid a fee of \$15.00 to the Center (Finding, Par. 18, R. p. 21). After her visit to the Center, Mrs. Stevens used this jelly (State's Exhibit L) for the purpose of preventing conception (Finding, Par. 19, R. p. 21). Mrs. Stevens' decision to continue the method of contraception she had been using was based on advice received by her from the defendants Estelle T. Griswold and C. Lee Buxton (Finding, Par. 20, R. p. 22).

HISTORY OF STATUTE

The Connecticut statute relating to contraceptives stems from the Comstock Act of 1873 (17 Stat. 598) currently 18 U.S.C. Sec. 1461, 18 U.S.C. Sec. 1462 and 19 U.S.C. Sec. 1305.

As originally introduced the Federal Bill contained an exemption for physicians from the portion of the bill which prohibited the possession, sale, or mailing of contraceptives. The Bill was amended on the floor of the Senate by Senator Buckingham of Connecticut by striking out the exemption in favor of physicians. The bill as amended passed and became 17 Stat. 598 (1873). In 1878 an attempt to amend the statute failed. From 1924 to 1936 twelve bills were introduced without success.¹

In 1881 New York became the first state to pass a statute regulating contraceptive devices modeling the Comstock Act, N.Y. Penal Code of 1881, Sec. 318-19.

On March 28, 1879 after legislative battle Connecticut amended Conn. Gen. Stat. Rev. 1875, Title 20, Ch. 8, Sec. 4,

¹ An excellent presentation of the history of the Comstock Act as well as statutes on contraceptives and cases reported under the federal and state statutes is found in Smith, *The History and Future of the Legal Battle Over Birth Control*, 49 Cornell Law Quarterly 275 (Winter, 1965).

p. 513 — which concerned introduction of obscene matter into the family or school — By adopting Public Act (of 1879) Chapter LXXVIII which added to the then existing statute provisions on possession of obscene material, the use of any drug, medicinal article, or instrument for the prevention of conception, or causing unlawful abortion. The text of this public act and the statute it amended are set out in Appendix A to this Brief. For a history of the legislative action on this act see Appendix B to this Brief. The part of the above statute dealing with the use of any drug, medicinal article, or instrument for the purpose of preventing conception was made a separate statute in the statutory revision of 1885 (Section 1539) and placed in Chapter 99 Offenses Against Humanity and Morality. From 1885 to the present day there have been five revisions of the General Statutes of Connecticut. The statute was reprinted each time, Conn. Gen. Stat. Rev. 1902, Section 1327; Rev. 1918, Section 6399; Rev. 1930, Section 6246; Rev. 1949, Sec. 8568; and Rev. 1958, Section 53-32. The statute in 1958 was taken out of the chapter on Offenses Against Humanity and Morality and placed in Chapter 939, Offenses Against the Person.

From 1879 to 1916 no attempt was made to either repeal or amend the contraceptive statute. In 1917 a bill was introduced which sought outright repeal of the statute. It failed. From 1923 to 1935 bills were introduced at each session of the General Assembly attempting to amend or repeal the statute all without success. There was no legislative activity in this area from 1935 to 1941. From 1941 to the present there have been attempts to amend or repeal the contraceptive statutes at each session of the legislature. All these bills have failed. Appendix C of this Brief is a history of the unsuccessful attempts to alter what is now Conn. Gen. Stat. 53-32. It is interesting to note that most of these attempted amendments

sought to insert an exception into the statute for physicians to prescribe contraceptives for health purposes.

Connecticut and New York are not alone in having statutes based on the Comstock Act, as of December 31, 1964 thirty states of the Union still have some statute specifically applicable to the prevention of conception.²

Although no attempt has been made to check the charters and/or ordinances of the municipalities in the states with no statutes on contraceptives, there is at least one city having such a law which can be noted from the case of *McConnell v. Knoxville*, 172 Tenn. 190, 110 S. W. 2d 478 (1937) upholding the power of the City of Knoxville, Tennessee to regulate the sale of contraceptives within its city limits.

Of the thirty states which have statutes regarding contraceptives, law of Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, and New York, would be violated by the facts in the case at bar.³

SUMMARY OF ARGUMENT

The decision of the General Assembly of Connecticut that the use of contraceptives should be banned is a proper exercise of the police power of the state.

² Citation of the various statutes will be found in the Appendix A at pages 23a to 27a of the Brief Amicus Curia filed by the Planned Parenthood Federation of America, Inc. in this case.

³ Mass. Ann. Laws (1956) tit. 1, Sec. 21; Minn. Stat. (1961) Secs. 617.25, Laws 1963, ch. 753; Miss. Code Ann. (1956), Secs. 2289; Mo. Rev. Stat. (1959), Secs. 563.300; Neb. Rev. Stat. (Reissue 1956) ch. 28 Secs 423, N.Y. Pen. Law art. 106. Secs. 1142, 1143.

ARGUMENT

I

APPELLANTS DO NOT HAVE STANDING TO RAISE CONSTITUTIONAL CLAIMS OF PERSONS NOT PARTIES TO THESE ACTIONS

The appellants were convicted as accessories (Sec. 54-196) to violations of Connecticut's Anti-Contraceptive Statute (Sec. 53-32). The basis of their conviction was that they provided women with contraceptive devices and instructed them as to their use as contraceptives. Since the appellants are asking this Court to upset their convictions, it logically follows that the issues raised here should be confined to the question of whether or not the Anti-Contraceptive Statute violates the appellants' constitutional rights.

The Court has on numerous occasions laid down the rule that one cannot attack a statute on the ground that it violates the rights of third parties. *New York ex rel Hatch v. Reardon* 204 U.S. 152 (1907); *Yazoo M.V.R.R. v. Jackson Vinegar Co.*, 226 U.S. 217 (1912); *Standard Stock Food Co. v. Wright*, 225 U.S. 540 (1912); *Collins v. Texas*, 223 U.S. 288 (1912); *Rosenthal v. New York*, 226 U.S. 260 (1912); *Tileston v. Ullman*, 318 U.S. 44 (1943).

In *Collins v. Texas*, supra, the holding was that an osteopath convicted for practicing medicine without a license did not have standing to contend that the statute in question infringed on the religious freedoms of certain religious groups.

The *Tileston* case, supra, is even more directly in point and should be considered as *stare decisis* on the issue of whether the appellants can raise the constitutional claims of their patients or potential patients. The *Tileston* case was a previous chal-

lenge of Connecticut's Anti-Contraceptive Statute by a physician who attempted to raise the constitutional rights of his patients. This Court held that *Tileston* did not have standing to litigate his patients' claims.

The appellants attempt to distinguish the *Tileston* case from the case at bar on the basis that the physician in that case did not raise any constitutional issues of his own. However, the appellants have not cited any cases or offered reasoning that would indicate that this distinction has any legal significance. One wonders if the appellants in making this distinction between *Tileston* and the instant case have just cynically thrown in a few constitutional issues on behalf of the physician in the hopes of coming out from under the umbrella of *Tileston*. To allow the appellants to raise the claims of patients of the physician is particularly ludicrous in the light of the fact that it was a group of patients who testified against the physician and made possible the conviction.

Appellants further contend that the patients' constitutional claims can be raised because the Anti-Contraceptive Statute is "void on its face." Admittedly, this Court has permitted the assertion of a third person's constitutional rights in a group of cases, terming the statutes in question to be void on their face. However, this doctrine has been limited to cases where a statute by its terms prohibits the exercise of expression. In cases where a statute by its terms does not prohibit expression, but which is applied to expression situations this Court has not applied the doctrine. *United States v. Petrillo*, 332 U.S. 1 (1947); *Sedler, Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 Yale L. J. 599 at page 612 (1962). Connecticut Anti-Contraceptive Statute deals with the use of contraceptive devices and only in a very secondary way through the accessory statute can it at all be considered to touch upon the rights of expression.

Nowhere in the record of this case prior to the notice of appeal to this court from the Supreme Court of Errors of Connecticut (R. p. 66) is there a claim 1) that these statutes are void on their face, 2) invade the privacy and liberty of women contrary to the Fourth, Ninth, and Fourteenth Amendments to the Constitution of the United States.

The Connecticut practice is that in order to be considered by the appellate Courts error must be specifically assigned and must "directly assert that the trial court committed error in the respects specified." (Connecticut Practice Book, (1963) Section 990). Further the claims of error must be briefed to be considered by the appellate court. (Conn. Practice Book, Section (1963) Section 1019). *Léo Foundation v. Cabelus*, 151 Conn. 655, 201 A2d 654, 655 (1964)

"As is always the case, however, state procedural requirements governing assertions and pursuance of direct and collateral constitutional challenges to criminal prosecutions must be respected." *Mapp v. Ohio*, 367 U.S. 643, 659, 6 L. Ed 2d 1081, 1092, 81 S. Ct. 1684, 1693, (1961) Note 9.

To say that the statutes are void on their face is a shocking claim. For then they could be used by the single and the married.

That contraceptives could be used by the married in relations with their spouses is a decision for legislative determination. But that single people should be allowed to use a contraceptive device is so contra to American experience, thought, and family law that it does not merit further discussion. That the appellant Griswold would supply contraceptives to the single element of society at the Center is only a conjecture. However, the appellants at the trial did introduce as defendants exhibit 4 a pamphlet entitled "Modern Methods of Birth Control" on the back inside cover of which was stamped the following:

"This publication was prepared under medical auspices for the use of persons 21 years of age or older, or married . . ."

The appellants in their claims of error below and in their Brief before the Supreme Court of Errors, it is supposed, to avoid the ruling of *Tileston v. Ullman*, 318 U.S. 44, 46, 87 L. Ed 603, 604 (1942) that a physician could not litigate the rights of patients not parties to the action, put great emphasis on the proposition even to the point of putting it in italics that the issue was "a denial of defendants' " rights and not that of the patients. Brief of Defendants-Appellants (page 59) A-427 Connecticut Records and Briefs 615. Also the appellants in their Jurisdictional statement, p. 12, state that they are asserting rights personal to them. Manifestly since this has been the issue argued by them and considered by the courts below, they cannot now be permitted to change their grounds of appeal. It would certainly be a novel rule if defendants in a criminal case were allowed to set up as a defense rights personal to a state's witness who testified against the defendants.

II

THE DECISION OF THE APPELLATE DIVISION (R. 40-50) AND THE SUPREME COURT OF ERRORS (R. 61-63) THAT SECTION 53-32 AND 54-196 OF THE GENERAL STATUTES OF CONNECTICUT, REVISION OF 1958, SHOULD BE SUSTAINED ON THE GROUND THAT SAID STATUTES CONSTITUTE A PROPER EXERCISE OF THE POLICE POWER OF THE STATE.

Of the few jurisdictions that have ruled on the constitutionality of contraceptive statutes all seem to be in agreement with the Connecticut Court that the regulation of contraceptives is a legitimate exercise of the state's police power to regulate public morals. Harrison, *Connecticut's Contraceptive Statute: A Recurring Problem in Constitutional Law*, 35 Connecticut Bar Journal 315 (September, 1960)

See *Commonwealth v. Allison*, 227 Mass. 57, 116 N.E. 265 (1917); *Commonwealth v. Gardner*, 300 Mass. 372, 15 N.E. 2d 222 (1938); *People v. Pennock*, 294 Mich. 578, 293 N.W. 759 (1940); *People v. Byrne*, 99 Misc. 1, 163 N.Y.S. 682 (917); *People v. Sanger*, 222 N.Y. 192, 118 N.E. 637 (1918), appeal dismissed for want of jurisdiction, 251 U.S. 537, 64 L.Ed. 403, 40 S. Ct. 55 (1919); *State v. Arnold*, 217 Wisc. 340, 258, N.W. 843 (1935); *State v. Kohn*, 42 N. J. Super. 578, 127 A. 2d 451 (1956); *Sanitary Vendors, Inc., v. Byrne*, 40 N. J. 157, 190 A. 2d 876 (1963); *Cavalier Vending Corp. v. State Bd. of Pharmacy*, 195 Va. 626, 79 S. E. 2d 636 (1954), appeal denied, 347 U. S. 995, 98 L. Ed. 1127, 74 S. Ct. 871 (1954); *Lanteen Laboratories v. Clark*, 294 Ill. App. 81, 13 N.E. 2d 678 (1938). Also see 1 C. J. S. — Abortion Section 44, page 341, 12 Am. Jr. 2d. — Birth Control, Section 4, page 370, and 96 A. L. R. 2d 948.

The fact that Connecticut's substantive statute (General Statutes, Section 53-32) is directed to the use of contraceptives and not to the dissemination of contraceptives — as are the statutes of some other states — is of no moment. For the Connecticut accessory statute (Gen. Stat. 54-196) when used in conjunction with the substantive statute bars the dissemination of contraceptives. In light of the Federal statutes (18 U.S.C. Section 1461, 18 U.S.C. Section 1462 and 19 U.S.C. Section 1305) — which contain prohibitions against mailing shipping or importing contraceptives or information about them — Connecticut's treatment of the contraceptive problem seems to be the most logical.

New York has a statute which prohibits the sale of contraceptives. There is an exception to that statute providing that physicians might use or prescribe such articles or drugs for the cure and prevention of disease. But in interpreting that section the New York Court, Cropsey, J. stated: "If it (New

York Statute) did in terms prevent the use of the articles, and make their use a crime, it would nevertheless be constitutional; and this would be so, even if there were no exception made to the provision." *People v. Byrne*, 163 N.Y.S. 682, 684 (1917).

The present action presents the same fact situation as was before this court in the cases of *Sanger v. People of the State of New York*, 251 U.S. 537, 64 L. Ed 403, 40 S. Ct. 55 (1919) and *Gardner v. Commonwealth*, 305 U.S. 559, 83 L. Ed. 353, 59 S. Ct. 90 (1938) — criminal convictions arising out of the operation of a birth control center where contraceptive were disseminated. This Court dismissed the appeals from the New York and Massachusetts Courts for want of a substantial federal question. It is submitted that the same should be done in the instant case.

As this Court has stated: "The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority . . . essential to the governing authority . . . essential to the safety, health, peace, good order, and morals of the community." *Jacobson v. Massachusetts*, 197 U.S. 11, 26, 49 L. Ed. 643, 650, 25 S. Ct. 358, 361 (1905).

Connecticut has statutes restricting several relations to the married with their spouses (Gen Stat. Section 53-218. Adultery and Gen. Stat. 53-219 — Fornication.) "[I]t (the Legislature) is not precluded from considering that not all married people are immune from temptation or inclination to extra-marital indulgence, as to which risk of illegitimate pregnancy is a recognized deterrent. . . ." *State v. Nelson*, 126 Conn. 412, 424, 11 A 2d 856, 861 (1940).

The appellants and their friends in their attempt to assert that the Connecticut Statutes as herein used are an unreasonable

use of the police power have equated the use of contraceptives and the practice of birth control.

While it is true that to use contraceptives is to practice birth control; it is not correct to say that to practice birth control one must use contraceptives.

In Connecticut no one may use an article as a contraceptive. That does not mean that married people may not practice birth control. Abstinence, withdrawal and the rhythm method are available to the married in Connecticut. There can be no doubt that abstinence from sexual intercourse will prevent pregnancy. The appellants seem to think withdrawal is effective, for they introduced into evidence at the trial over the objection of the appellee Defendants' Exhibit No. 6, a book in which is contained the following:

However, withdrawal has had a very poor reputation among doctors for generation, and some physicians still attribute many male and female ills to this technique. One gets the impression that such medical charges are more emotional than authoritative. In recent years, when some of us have been led to re-examine this method, we have been surprised to discover that there is virtually nothing of substance in medical literature to provide a scientific foundation for the charge. Guttmacher, *The Complete Book of Birth Control*, Ballantine Books, p. 64.

The rhythm system has been receiving more scientific attention of late. That the time of being able to pinpoint the time that ovulation occurs may be here may be seen from a recent gynecological report. Groden, *Ovulation Regulation*, 32 The Linacre Quarterly (February, 1965) pp. 66-72.

"Moreover, although it is somewhat dangerous to argue from statistics, at least one comparative study between those who

practiced contraception and those who practiced rhythm showed that the rate of infidelity was much higher among those who practiced contraception (*Supplément de la Vie Spirituelle*, 1958, No. 1, pp. 60-61), Connery, *The Sign*, October 1960.

III

APPELLANT'S CONSTITUTIONAL RIGHTS ARE NOT VIOLATED BY THESE STATUTES

A

APPELLANT BUXTON

It is argued by the appellant Buxton that his right to practice medicine is impaired. The state denies this. It is the opinion of the appellee that the practice of medicine is directed to the treatment, cure, and/or prevention of disease. Nowhere in either the testimony, findings, or claims of error is there any claim that the women who testified in this case were in other than perfect health.

Therefore, the operation of the Planned Parenthood Center by the Planned Parenthood League in New Haven was not the practice of medicine. Nor could it be, for in Connecticut a corporation cannot practice medicine. The exceptions to the foregoing restrictions in the practice of medicine are hospitals and clinics formed by three or more physicians. The Planned Parenthood Center of New Haven cannot fit either exception, nor can the appellant, Griswold, hide her conduct under the protective cover of the appellant Buxton's medical coat. Dr. Buxton's conviction rested on his behavior as staff doctor on the day of Mrs. Stevens' visit to the Center, not on his being the medical director of the Center. That when Mrs. Stevens was given a pelvic examination by Dr. Buxton, he was practicing medicine cannot be disputed by the state. But when he decided

that Mrs. Stevens could use the contraceptive jelly (State's Exhibit L) and it must be remembered that the decision as to the type of contraceptive to be used was in the final analysis the decision of the staff doctor who examined the "patient" — (Finding Par. 12e R. p. 19) it cannot be said that it was a medical decision. Mrs. Stevens is a young woman. She was married less than a year. There is no indication in the record that she was in other than perfect health. There is no legitimate medical reason in the record of this case why Dr. Buxton instructed Mrs. Stevens to use the contraceptive jelly and instructed her in its use. That Mrs. Stevens did in fact use the jelly as a contraceptive upon the advice of the appellants Buxton and Griswold who supplied Mrs. Stevens with the jelly and extracted a fee of \$15.00 from Mrs. Stevens — was the undisputed testimony of Mrs. Stevens and was found as a fact by the trial court (Finding Par. 20 R. p. 22). Therefore the only reason for that can be advanced for Dr. Buxton's actions enabling Mrs. Stevens to use this jelly as a contraceptive was that it was in line with his social philosophy. It is the position of the appellee, the State of Connecticut, that this social philosophy must fall before the police power of the state.

"Besides, there is no right to practice medicine which is not subordinate to the police power of the states." *Lambert v. Yellowley*, 272 U.S. 581, 596, 71 L. Ed. 422, 429, 47 S. Ct. 210, 214, 49 A.L.R. 575, 583 (1926).

B

APPELLANT GRISWOLD

The appellant Estelle T. Griswold was the Executive Director of the Planned Parenthood League of Connecticut, a ~~sal~~aried position (Finding Par. 5, R. p. 17). In addition she was Acting Director of the Planned Parenthood Center of New

Haven both before its opening and while it was in operation and was in charge of administration of the Center (Finding Par. 6, R. p. 17, Finding Par. 11, R. p. 18). From the Brief of the appellants (pp. 14-15) one might be led to the conclusion that the appellant Griswold was merely assisting the appellant Buxton. The converse is more accurate. "The policy of open defiance of the Connecticut Statute had been considered by the League as a possible response to an unfavorable decision of the Court (*Poe v. Ullman*, 356 U.S. 497, 81 S. Ct. 1752, 6 L. 2d 989 (1961)). Mrs. Richard Griswold, Executive Director of the League, had urged this approach, but not all of her colleagues agreed with her. But the League's Board of Directors unanimously endorsed Mrs. Griswold's position in a meeting one week after the decision was rendered." Smith, *The History And Future of the Legal Battle Over Birth Control*, 49 Cornell Law Quarterly 295-296 (1964). The appellant Griswold at all times was in charge of the Center. Her claim of a right to earn a living is entitled to the same consideration as would be a similar claim made by one charged with being a supplier of burglar tools.

"[I]t is entirely true — that no person in any business has such an interest in possible customers as to enable him to restrain exercise of proper power of the State upon the ground that he will be deprived of patronage." *Pierce v. Society of Sisters*, 268 U.S. 510, 535-536, 45 S. Ct. 571, 69 L. Ed. 1070 (1925). In that case it was held that the State could not make public schools the only schools for children from eight to sixteen years of age. This Court stated: "These parties (private schools) are engaged in a kind of undertaking not inherently harmful, but long regarded as useful and meritorious." *Pierce v. Society of Sisters*, supra p. 534. This cannot be said of the use of contraceptives or indeed even of birth control. "Birth control is a highly controversial subject. Social thinking is divergent.

It finds frequent expression at legislative hearing." *Tileston v. Ullman*, 129 Conn. 84, 94, 26 A 2d 582, 587 (1942).

"Certainly, Connecticut's judgment (on contraception) is no more demonstrably correct or incorrect than are the varieties of judgment, expressed in law, on marriage and divorce, on adult consensual homosexuality, abortion and sterilization, or euthanasia and suicide." Mr. Justice Harlan, dissenting in *Poe v. Ullman*, 367 U.S. 497, 547, 6 L. Ed. 2d 989, 1021; 81 S. Ct. 1752, 1779 (1961).

C

APPELLANTS' FREEDOM OF SPEECH HAS NOT BEEN VIOLATED

The appellants' claim of freedom of speech is without merit. It was not the speech of the appellants that caused their conviction. It was their actions. When they furnished contraceptive material to women to be used as contraceptives and instructed the women as to their use to prevent pregnancy, then the appellants have, under Connecticut law, committed a crime and have no more right to justify their conduct as being protected by the constitutional right of freedom of speech than a man yelling fire in a crowded theater, or a person placing a wager over the phone, or a purveyor of implements to one whom the purveyor knows intends to use them as burglar tools. To accept the appellants' claim of freedom of speech would be to change a right into a license.

IV

COMMENTS AS TO CERTAIN CLAIMS MADE BY APPELLANTS IN THEIR BRIEF

There has been no invasion of anyone's privacy in this case. "The necessary proof of the offense was supplied by the voluntary testimony of three married women. This evidence was not

coerced nor was it illegally or surreptitiously obtained." Opinion of Appellate Division R. p. 47.

The legislative hearings concerning the repeal and/or amending of the Connecticut statutes banning the use of contraceptives (Conn. Gen. Stat. Rev. 1958 §§ 53-32 and 54-196) have shown that there is a dispute (to give the appellants the benefit of any doubt) as to the medical reasons for repealing the statutes or for amending them to allow doctors to prescribe contraceptives. At the hearings on House Bill (H.B.) 1177 to repeal what is now § 53-32 and H.B. 1182 exempting from the statutes a) physicians in the case where a danger to life or impairment of health of a married woman, b) married persons using method so proscribed, c) pharmacists filling such prescription, held by the Public Health and Safety Committee on April 20, 1955 several prominent physicians testified in opposition to the bills. John M. Paget, M.D., Neurologist and Neurological Surgeon, Diplomat of American Board of Neurological Surgery and a Fellow of the American College of Surgery stated: "As a specialist of the diseases of the nervous system, it is my considered opinion that the practice of birth control is frequently responsible for nervous disorders." page 268. Transcript of Testimony at Public Hearings. Several obstetricians and Gynecologists also spoke in opposition to the proposed bills: Jules Terry M.D. page 269, Katherine Quinn Nolan, M.D. p. 270 and Frederick C. LeBrett, M.D. pp. 272-274. Dr. LeBrett, who was the Chief, Department of Obstetrics and Gynecology at St. Mary's Hospital at Waterbury ended his testimony: "In conclusion, I object to these bills because, one, they will in no way reduce the incidence of hemorrhage, or toxemia in pregnancy, two all authorities agree that hemorrhage is best prevented by good pregnancy control not birth control, and three, all authorities including our own committee of the Connecticut State Medical Society agree that toxemia is best prevented by

good pregnancy control. No article on birth control or pregnancy prevention has been deemed worthy of print in the Year Book of Obstetrics and Gynecology for many years. It definitely has no place in our modern obstetrics practice." pp. 273-274.

Similarly at the hearing on H.B. 572, which would have permitted physicians to prescribe contraceptives to meet the health needs of married women and married women to use contraceptives so prescribed before the Public Health and Safety Committee of the Connecticut General Assembly on March 21, 1957, physicians spoke in opposition to the proposed legislation. Thomas J. Tarasovic, M.D., Obstetrician and Counselor of the Bridgeport Medical Society stated: "Modern medicine in recent years has made such important strides in affording new relief and treatment for conditions which previously seriously complicated pregnancy that it becomes almost a farce to need a measure allowing physicians to give contraceptive advice to married women patients whose health or life would be engendered by pregnancy." (p. 297.

"Because of the new many successful procedures in the treatment of conditions complicating pregnancy, because our maternal mortality is now, as a result, at an almost irreducible minimum this bill becomes unnecessary." p. 298.

John F. Knowland, M.D. Surgeon, former president of the Bridgeport Medical Society testified in part: "I am here to oppose the proposed legislation, primarily because I am a physician. I will limit all my remarks to the medical aspects of this controversial subject." p. 299.

"Furthermore, I would have to appear before you today in opposition to this proposed legislation, because I feel that no doctor in the light of modern medicine and obstetrics can justifiably say to the cardiac, to the tuberculosis patient, to the hyper-

tensive that they could not have a baby." p. 300. The transcripts of testimony of the public hearings on bills before the Connecticut General Assembly — in the instances cited above before the Public Health and Safety Committees in 1955 and 1957, are official records of the State of Connecticut and may be found in the State Library at Hartford as well as in the Office of the Secretary of State. The above testimony is cited not as being an extensive treatment of the testimony before the General Assembly on the subject of contraceptives, but as an example of the medical testimony before the General Assembly in support of the retention of the contraceptive statutes in their present form.

From the foregoing it would appear — and giving the appellants the benefit of any doubts — that the situation before the General Assembly is quite similar to that faced by Congress when it restricted the prescription of liquor. In both the *Lambert v. Yellowley*, 272 U.S. 581, 71 L. Ed. 442, 47 S.Ct. 210, 49 A.L.R. 575, (1926) and the case at bar it can be said that "High medical authority being in conflict is, to the medicinal value," in the *Lambert*, supra, case liquor as medicine and in the situation presently before the Court the medical need for contraceptives, that the legislature acted within the scope of its police power. Nor can the *Lambert* case (supra), be distinguished from the case at bar on the grounds that Congress limited the amount of liquor a physician could prescribe while Connecticut by the use of its contraceptive statute (Sec. 53-32) and its accessory statute (Sec. 54-196) bars the physician prescribing contraceptives at all, for it is clear that had Congress banned physicians from prescribing liquor at all, the decision of *Lambert v. Yellowley*, supra, would have been the same.

One would think that if there was a medical necessity for the repeal or amendment of Connecticut's contraceptive statute, the

Connecticut Medical Society would have taken a position that the statute be so repealed or amended. In an editorial comment to an article by the appellant Buxton entitled *Birth Control Problems in Connecticut — Medical Necessity, Political Cowardice and Legal Procrastination* in 28 Connecticut Medicine — Connecticut State Medical Journal (August, 1964) page 581, the editor notes: "The Connecticut State Medical Society has taken no official position on this problem."

The appellee emphasizes the opinions filed by the Courts below in the consideration of these cases — (Memorandum on Demurrer to Information (R. pp. 3-6; 9-12) filed by Lacy, J., the opinion of the Appellate Division of the Circuit Court (R. pp. 40-50), and the opinion of the Supreme Court of Errors of Connecticut (R. pp. 61-63). This is not the first time that the constitutionality of these two statutes has been under attack in the courts of Connecticut under various factual situations. *State v. Nelson* (and companion cases) 126 Conn. 412, 11 A. 2d 856 (1940), like the present case, was a criminal prosecution of two physicians and a nurse (no such occupation is claimed for the appellant Griswold) who were participants in the operation of a birth control center in Waterbury. The issue before the Supreme Court of Errors raised by demurrer was the constitutionality of the State's charge that Dr. Nelson, Dr. Goodrich, and nurse McTernan assisted, abetted and counseled married women to use a drug and contraceptive device for the purpose of preventing conception because in the opinion of the defendants the preservation of the general health of the women required it. The Supreme Court of Errors citing *People v. Byrne*, 163 N.Y.S. (Supreme Court Term (1917) 682 and *Commonwealth v. Gardner*, 300 Mass. 372, 15 N.E. 2d 222 (1938), 305 U.S. 559, 59 S. Ct. 90, 83 L.Ed. 353 (1938) (appeal dismissed for want of a substantial federal question)

held the statutes good against the constitutional attack as a proper exercise of the police power of the State.

From 1940 to the time of the instant case, the Supreme Court of Errors of Connecticut has held the statutes here were a proper exercise of the police power of the State on three occasions. These were all actions for declaratory judgments. *Tileston v. Ullman*, 129 Conn. 84, 26 A 2d 582 (1942) held that these statutes prohibited a physician from prescribing contraceptives for married women in cases where pregnancy would endanger the life or health of the married women. This court dismissed an appeal on the grounds that a physician had no standing to litigate the rights of patients not parties to the action. *Tileston v. Ullman*, 318 U.S. 44, 46, 87 L. Ed. 603, 604 (1942). In 1959, the Supreme Court of Errors again held these statutes good against a claim of unconstitutionality in cases where a physician, the same Dr. Buxton who is one of the appellants in the present case, and his patients claimed an exception for a physician to prescribe the use of contraceptives to married women in cases where pregnancy would endanger the life or health of married women. The difference between *Tileston*, supra, and the 1959 case was that in 1959 the married women and the physician were both parties to the action, *Buxton v. Ullman* (and companion cases), 147 Conn. 48, 156 A. 2d 508 (1959). This Court dismissed the appeals from the Supreme Court of Errors of Connecticut for an absence of a justiciable controversy. *Poe v. Ullman* (and companion cases), 367 U.S. 497, 6 L. Ed 2d 989, 81 S. Ct. 1752 (1961). The last case considered by the Courts of Connecticut prior to the present cases, was *Trubek v. Ullman*, 147 Conn. 633, 165 A 2d 158 (1960), 367 U.S. 907, 6 L. Ed 2d 1249, 81 S. Ct. 1917 (1961) appeal dismissed, certiorari denied. The issue was does a married couple have a right to use contraceptives, no medical reasons being advanced. In the record of the present

case there is no reason advanced such as in the previous cases that the statutes should not be applied. The closest fact situation would seem to be the *Trubek* case, supra, yet the appellants' arguments and authority are directed more at a fact situation as in *Tileston*, supra, or the earlier *Buxton*, supra — urgent medical reasons to avoid pregnancy. The only reasons that the appellants can legitimately raise in the present case for their participation in the Center which distributed contraceptives was that it was in accord with their social philosophy.

Again the appellants make the claim in their brief (page 11, 77) and in their Petition, p. 18, state that contraceptive devices may be obtained in Connecticut. There is no foundation in the record for this statement. In fact the opposite is true. In their assignment of errors to the Appellate Division of the Circuit Court, R. p. 37, and their Petition For Certification By the Supreme Court of Errors, R. p. 54, 58-59, the appellants cited as error the sustaining of objection made by the appellee to a question posed on cross-examination: "Now in the course of your investigation, Detective Berg, did you ascertain whether these products were available anywhere else in the City of New Haven?" This is the only place in the record where availability of contraceptives is mentioned. The appellants have not claimed this ruling on evidence in their Notice of Appeal to This Court nor in Questions to be reviewed in the Jurisdictional Statement. Manifestly they cannot make that claim now. In any case, it is Hornbook law that it cannot be set up as a defense to a prosecution of a crime that another who has committed the same offense has not been indicted. 1 *Whartons Criminal Law*, 12th Ed. Section 392. Further even if the appellants had introduced evidence at the trial that contraceptives were readily available, they did not, or requested the trier to take judicial notice of the supposed availability and use of contraceptives, they made no

such request, it still would not help the appellants in this case. A custom and usage prevailing in a community cannot be set up as a defense to a prosecution for a crime, because such custom and usage cannot operate to supersede a criminal statute, or to overthrow the rules of evidence by which the commission of an offense is proved, even though such custom and usage may have been for a long time acquiesced in by the community in which it prevails. 1. Whartons Criminal Law, 12th Ed. Section 388. If such were not the rule, no one would be convicted of gambling offenses.

At page 10 of the appellant's Brief a portion of a letter by the then State Commissioner of Food and Drugs is quoted to substantiate their claim regarding the sale of contraceptive devices. The letter referred to is not based upon any legal authority, and, at most, represents the personal views of the then Commissioner.

As is evidenced by the following, the present Commissioner does not share the views quoted by the appellants: "Please be advised that this officer is not responsible for or agreed with what might have been the opinion of the Commissioner of Food and Drugs of that date." Letter of Commissioner Frassinelli, dated June 30, 1960, to Fowler V. Harper. Further an article in the August 28, 1962 edition of the Hartford Courant indicates that the State Consumer Protection Commissioner persuaded a pharmacy chain in the Hartford area to stop the sale of foam contraceptive.

Again the appellants in their brief pp. 72-74 cite the so-called population explosion. It is interesting to note that in both the nation and in the State of Connecticut the birth rate is on the decline. An Associated Press release emanating in Washington, D.C. as reported in the New Haven Register of

September 21, 1964 states that "[t]he population reference bureau says the birth rate in the United States is declining." "In a report the bureau said the decline cannot be attributed either to a change in childbearing potential of American women or the development of new contraceptives." The Connecticut statistics on births are even more informative. According to the State Department of Health as reported in the New Haven Register of December 29, 1964 there were ten fewer births in Connecticut in the first ten months of 1964 as compared to the previous year. The complete figures for 1964 as reported in the New Haven Register of February 21, 1965 shows that the birth rate dropped from 20.6 to 20.2 per 1,000 population, making the seventh successive year that the rate has decreased.

The arguments of the appellants in essence attack the desirability of these statutes. It has been held that the Supreme Court may not decide the desirability of legislation in determining its constitutionality; the forum for correction of ill-considered legislation being a responsive legislature. *Daniel v. Family Sec. Life Ins. Co.*, 336 U.S. 220, 69 S. Ct. 550 (1949)

CONCLUSION

The judgment of the Supreme Court of Errors of Connecticut should be affirmed.

Respectfull submitted,

JOSEPH B. CLARK
Counsel for Appellee

171 Church Street
New Haven, Connecticut
March 8, 1965

CERTIFICATE OF SERVICE

I, Joseph B. Clark, counsel for appellee, and a member of the bar of the Supreme Court of the United States do hereby certify that on the 8th day of March, 1965, I served a copy of the foregoing Brief For Appellee upon the appellants by personally delivering four copies to Thomas I. Everson, Esq. at his office at 127 Wall Street, New Haven, Connecticut and four copies to Catherine G. Rorabach, Esq. at her office at 185 Church Street, New Haven, Connecticut.

JOSEPH B. CLARK
Counsel for Appellee

APPENDIX A

Public Acts of 1879
Senate Bill No. 43
Chapter LXXVIII

An Act to Amend an Act concerning Offences against Decency, Morality, and Humanity.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

That section four, Chapter eight, title twenty, page 513 of the General Statutes be amended so as to read as follows:

Every person who shall sell, or lend or introduce into any family, college, academy, or school, or shall have in their possession, for any such unlawful purpose or purposes, and obscene, lewd, or lascivious book, pamphlet, paper, picture, print, drawing, figure, or image, or other publication of an indecent nature, or who shall manufacture, sell, advertise for

sale or have in their possession, for any such unlawful purpose or purposes, any article, thing, or instrument designed, or intended and adopted for, any indecent and immoral use, purpose, or nature, or use any drug, medicine, article, or instrument whatsoever, for the purpose of preventing conception, or causing unlawful abortion, shall be fined not less than fifty dollars nor more than three hundred dollars, or imprisoned not less than sixty days, nor more than one year, or both.

Approved, March 28, 1879.

Title 20, Ch. 8, Sec. 4, p. 513 —

Conn. Gen. Stat. Rev. 1875

Sec. 4 — Every person who shall purchase or introduce into any family, college, academy or school, any printed or engraved matter containing obscene language, prints, or descriptions, or any drawing or figure of an obscene character, shall be fined not more than seven dollars.

APPENDIX B

The Adoption of the Contraceptive Statute in

The General Assembly of Connecticut —

A History of Legislative Action

On February 7, 1879 Senator Carlos Smith of the 4th District introduced Senate Bill No. 43 entitled: "An Act to Amend an Act Concerning Offenses Against Decency, Morality, and Humanity." The bill provided penalties for the sale of obscene literature and the manufacture and sale of indecent instruments, illegal drugs, and medicines etc. The bill was read for the first time and referred to the Committee on Temperance (Senate Journal (S.J.) p. 236.

On February 11, 1879 the bill was received in the House of Representatives read for the first time and referred to the Committee on Temperance House Journal (H.J.) p. 272.

On February 13, 1879 the Temperance Committee of the Senate recommended passage, the bill was read for the second time, and tabled for the calendar and printing. (S.J. p. 294).

On February 19, 1879 the bill was taken from the table in the Senate, read for the third time, explained by Senator Hoyt of the 12th District, the Chairman of the Committee. The report of the Committee was accepted and the bill passed. S.J. p. 317).

On February 20, 1879 the House Committee on Temperance having received notice that the bill had passed the Senate recommended passage of the bill. The bill was read for a second time, and on motion was recommitted to the committee (H.J. 333-334).

On February 25, 1879 the Senate having received notice that the House had recommitted the bill to committee voted to reconsider the bill and recommitted it to committee (S.J. 339).

On March 6, 1879 the Temperance Committee reported that it recommended rejection of the bill and adoption of a substitute bill. The substitute bill was read twice and tabled for the calendar and printing (S.J. p. 414).

On March 12, 1879 the Senate took the substitute from the table, the bill was read for a third time and explained by Senator Hoyt, the Chairman of the Committee. The substitute bill passed (S.J. p. 449). On the same day the House received notice that the Senate had passed the substitute bill — read it twice and tabled the bill for the calendar and printing (H.J. 488).

On March 18, 1879 the bill was taken from the table in the House and read a third time. A substitute was offered on the floor. The bill was withdrawn by the chairman of the Temperance Committee. (H.J. p. 548).

On March 19, 1879 the bill was again taken from the table in the House. The bill was rejected after explanation by Mr. Barnum of Bridgeport. The substitute bill was rejected, the report of the committee rejected, and the bill was reconsidered and tabled. (H.J. p. 576).

On March 20, 1879 the House again took the bill from the table. The bill was read and discussed by Mr. DeForest of Middlebury. The bill as amended passed. (H.J. p. 594).

On March 21, 1879 after discussion by Senators Hoyt, Mather, Patton, and Smith, the Senate voted to reconsider its previous actions and passed the bill as amended.

APPENDIX C

Attempted Repeal and/or Amendment of the Contraceptive Statutes in the Connecticut General Assembly

1917 — House Bill No. 221. (by request — this phrase is placed on a bill by the legislator who introduces it showing that he is introducing a bill for a person but that the legislator does not favor the adoption of the bill), entitled "An Act repealing Section 1327 of the General Statutes." Rejected by the House (H.J. p. 694) and Senate (S.J. p. 755).

1923 — House Bill 504 Exempting physicians and nurses from the statute when giving advice. Rejected by House (H.J. p. 826) and Senate (S.J. p. 832).

1925 — Senate Bill No. 446 (by request) providing for an

exception allowing physicians to prescribe contraceptives. Rejected by Senate (S.J. p. 692) and House (H.J. p. 763).

1927 — House Bill No. 105 again an exemption for physicians. Rejected by House (H.J. p. 713) and Senate (S.J. 711-712) Senate Bill 145 (by request) to repeal the statute. Rejected by Senate (S.J. p. 673) and House (H.J. pp. 743-744).

1929 — Senate Bill No. 44 (by request) to repeal the statute. Rejected by Senate (S.J. p. 577) and House (226—18) (H.J. p. 663-664).

1931 — House Bill No. 156 providing for an exception in favor of physicians. The committee recommended rejection and adoption of a substitute which would allow exemption only when physician found a pregnancy would constitute a danger to life or health. After the Amendment failed the House rejected the bill 172-76 (H.J. p. 999), and the Senate (S.J. p. 975). House Bill No. 156 provided for legislation of use of contraceptives under the direction of physician. Rejected by House (H.J. p. 526) and Senate (S.J. p. 521).

1933 — House Bill No. 519 provided an exemption to physicians for reasons of health. An amendment was offered on the floor of the House. It passed 169-80 (H.J. pp. 1489-1494). After the Senate had rejected the Bill 20 Senators voted to reject (S.J. 1586), the House again voted to pass the bill as amended 171-72 (H.J. p. 1776). The Senate tabled the bill after debate (S.J. p. 2054).

1935 — House Bill No. 850 — providing for an exemption for preservation of health. Passed by House (H.J. p. 547). The senate recommitted the bill to Committee (S.J. p. 517) where it died.

1941 — House Bill No. 1813 — provided exemption to hospitals and institutions under supervision of physician to

prescribe for married women. Substitute bill passed house 164-64 (H.J. p. 1568). Rejected by Senate 23-9 (S.J. p. 1749).

1947 — House Bill No. 953 exemption when life or health endangered. House passed (H.J. p. 733). Senate rejected (S.J. p. 753).

1949 — House Bill No. 1110 exemption in favor of married women was referred to the Committees on Public Health and Safety and was never reported out of Committees (H.J. p. 307) (S.J. p. 368). Senate Bill No. 570 was an act to ban the future introduction of bills to change the contraceptive statute. It was tabled in the Senate (S.J. p. 531) and never reported out of Committee in the House.

1951 — House Bill No. 1483 exemption when life or health effected. Passed by House 121-62 (H.J. p. 717). Senate bill No. 696 — identical with House Bill No. 1483. The Senate committee never reported the bills out.

1959 — House Bill No. 3497 allowed an exception pursuant to spiritual and medical advice was never reported out of the House and Senate Committee.

1961 — House Bill No. 3753 to repeal the statute House Bill No. 3741 exemption for the married was never reported out of the Senate Committee. H.B. No. 3753 never came to a vote in either branch of the General Assembly.

1963 — House Bill No. 3790 to repeal the statute. Passed by House 149-66 (H.J. p. 1132). Senate Committee never reported the bill out.

1965 — According to the newspapers a bill was introduced in the General Assembly on February 10, 1965. Counsel for appellee has not been able to obtain a copy of the bill as of this date.

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**In the
Supreme Court of the United States**

OCTOBER TERM, 1964

No. 496

ESTELLE T. GRISWOLD

AND

C. LEE BUXTON,

Appellants,

v.

CONNECTICUT.

**Appeal From The Supreme Court Of Errors Of
Connecticut**

REPLY BRIEF FOR APPELLANTS

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REPLY BRIEF FOR APPELLANTS

On page 10 of our main brief we quoted from a letter of the Connecticut Commissioner of Food and Drugs to the Bridgeport Pharmaceutical Association, dated September 15, 1954, in support of our contention that certain contraceptive

devices may be prescribed by physicians for therapeutic purposes and sold by Connecticut pharmacists. On page 27 of the Brief for Appellee counsel quote from a later letter, dated June 30, 1960, as basis for their position that the present Commissioner does not share the views of his predecessor.

At the time of preparing our main brief we were not aware of the letter cited by counsel for appellee. We therefore set forth the correspondence in full.

June 10, 1960

Connecticut Commissioner for Food and Drugs
State Capitol
Hartford, Connecticut

Dear Sir:

It is my understanding that your office sent a letter to the Secretary of the Bridgeport Pharmaceutical Association on or about September 15, 1954 concerning the sale of contraceptive devices in Connecticut. If my information is correct, you stated among other things, "Since diaphragms have such therapeutic and other uses, there is no reason why vaginal diaphragms may not be prescribed or ordered by a physician and such order filled by a pharmacist."

I would greatly appreciate it if you would supply me with a copy of the entire letter referred to above.

Sincerely yours,

/s/ Fowler V. Harper

June 30, 1960

Fowler V. Harper
Yale University Law School
New Haven, Connecticut

Dear Mr. Harper:

I have enclosed herein a copy of the letter you make mention of, in your letter of the 10th. Please be advised that this office is not responsible for or agreed with what might have been the opinion of the Commissioner of Food and Drugs of that date.

Sincerely,

/s/ Attilio R. Frassinelli
Commissioner
Department of Consumer Protection

September 15, 1954

Bridgeport Pharmaceutical Association, Inc.
1244 Stratford Avenue
Bridgeport, Connecticut
Attention: Mr. Simon Frank
Secretary

Dear Sir:

Replying to your letter of September 13, 1954, asking for information concerning the status of vaginal diaphragms under the laws of the State of Connecticut, we would say that information has been submitted to this office showing that vaginal

diaphragms have various uses among which are artificial insemination, for cystoceles and rectoceles and for relaxed vaginal walls and torn muscles in aged females.

Since diaphragms have such therapeutic and other uses there is no reason why vaginal diaphragms may not be prescribed or ordered by a physician and such order filled by a pharmacist. We have always taken the stand that a pharmacist is entirely within his rights to fill any prescription or order from a physician. Such order may be given orally or writing.

Further, both the Federal Food and Drug Administration and the Connecticut Food and Drug Commission agree that diaphragms are devices and not drugs and both agencies accordingly do not require that physicians' oral orders authorizing their sale be reduced to writing or, if such orders are given in writing, be retained on file.

We trust that the above will satisfactorily answer your questions.

Very truly yours,

/s/ Theodore J. Richard,
Commissioner Food and Drugs

July 5, 1960

Mr. Attilio R. Frassinelli
Food and Drug Commission
State Office Building
Hartford, Connecticut

Dear Mr. Frassinelli:

Thank you for your letter of June 30 with the enclosed copy of Commissioner Richard's letter to the Bridgeport Pharmaceutical Association.

In your letter you say, "Please be advised that this office is not responsible for or agreed with what might have been the opinion of the Commissioner of Food and Drugs of that date."

I assume that this means merely that you are not prepared to commit yourself either way as to the validity of the statement made by Commissioner Richard. I would appreciate it if you would advise me whether this interpretation of your letter is accurate.

Sincerely yours,

/s/ Fowler V. Harper

So far as we are aware, no reply was received to Professor Harper's letter of July 5, 1960.

In view of the ambiguity resulting from the above correspondence we do not further rely upon the Commissioner's letter of September 15, 1954. We do, however, adhere to our position that Sections 52-32 and 54-196 of the Connecticut General Statutes do not prohibit the sale or use of contraceptive devices in Connecticut for the prevention of disease, as distinct from the prevention of conception.

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